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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~1100~~ 202

DISTRICT 50, UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

TUNGSTEN MINING CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CRAMPTON HARRIS
1018-19 First National
Building
Birmingham 3, Alabama

CHARLES P. GREEN
Louisburg, North Carolina

VELAZETON COWHERD
900-15th Street, N. W.
Washington 5, D. C.

ARLED D. TREHERNE
900-15th Street, N. W.
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

District 50, United Mine Workers of America, the petitioner herein, prays that a writ of certiorari be issued to review the final judgment and decree of the United States Court of Appeals for the Fourth Circuit entered in Case No. 7293 in that court, entitled Tungsten Mining Corporation, Plaintiff-Appellant, versus District 50, United Mine Workers of America, Defendant-Appellee, reversing the judgment and decree of the United States District Court for the Eastern District of North Carolina at Raleigh which adjudged that Tungsten Mining Corporation recover

nothing in its suit for damages against District 50, United Mine Workers of America, under Section 303 (a) (3) and (b) of the National Labor Relations Act, as amended.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has been published in 242 F (2d) p. 84, and appears in the Appendix hereto, pp. 1a to 27a. The opinion of the District Court is reported in 142 F. Supp. p. 800, Appendix pp. 47a to 57a.

JURISDICTION

The opinion, judgment and decree of the United States Court of Appeals for the Fourth Circuit was rendered and entered on February 12, 1957. Appendix p. 1a.

Timely application for rehearing was denied on March 26, 1957. Appendix p. 46a.

The jurisdiction of this court is invoked under Title 28, U. S. Code, sec. 1254, which provides in part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

QUESTIONS PRESENTED

1. Is a labor union under such a duty to put on evidence before the National Labor Relations Board in defense of a charge of striking in violation of Sec. 8 (b) (4) (C) of the National Labor Relations Act, as

amended, that the failure to put its evidence before the Board prevents the union from successfully using the evidence as a defense when sued for damages by the employer under Section 303 (a) (3) and (b) in a United States District Court?

2. Is formal decertification by the National Labor Relations Board the only manner in which a certification can cease to be effective?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution and Sections 1, 2 (1), 7, 8 (a) (5), 8 (b) (4) (C), 9 (a), 9 (B) (3), 13, 303 (a) (3) and 303 (b) of the National Labor Relations Act, as amended, Rule 52 (a) of the Federal Rules of Civil Procedure, all of which appear in the Appendix pp. 73a to 77a.

STATEMENT OF THE CASE

About April 3, 1946, the National Labor Relations Board certified United Stone and Allied Products Workers of America, C.I.O. (hereinafter called Stone Workers) as the collective bargaining representative of the employees of Tungsten Mining Corporation's operation near Henderson, North Carolina. On February 3, 1953, on petition of the National Labor Relations Board, Judge Gilliam of the United States District Court for the Eastern District of North Carolina, enjoined District 50, United Mine Workers of America, from striking Tungsten Mining Corporation in violation of Sec. 8 (b) (4) (C) of the National Labor Relations Act, as amended. District 50 immediately obeyed the injunction and the strike ended that day.

Notwithstanding the end of the strike, the Board, on March 3, 1953, began a hearing of an unfair labor charge under Sec. 8 (b) (4) (C) against District 50. District 50 put on no evidence in defense of the charge. The Board found District 50 guilty as charged and entered an order (106 NLRB p. 909), set out in the Appendix hereto, pp. 71a-73a, which had already been fully covered by the February 3rd injunction which appears in the Appendix hereto, pp. 58a-59a.

The Board, despite the end of the strike, applied to the United States Court of Appeals for the Fourth Circuit for enforcement of its order. District 50 argued to the court that the question was moot and that there had already been substantial compliance by District 50 with the Board's order. Appendix, pp. 77a-78a. Without opinion, on March 19, 1954, the court entered a decree enforcing the order.

On December 3, 1953, Tungsten sued District 50 for damages under Sec. 303 (a) (3) and (b) of the Act. The case was tried in the United States District Court without a jury. The court found and wrote:

> "I am adjudging that District 50 is not liable to Tungsten because Stone Workers, despite its certification, was no longer a going concern, nor did it represent the overwhelming majority of Tungsten's employees—a situation of which Tungsten had every reason to be well aware." Appendix p. 56a

We summarize the facts found by the trial court and, in part, quote the exact language of the court: Representatives of District 50, at the instance of William Holleman and other employees of Tungsten dissatisfied with Stone Workers representation, visited Tung-

sten and supplied Holleman with application cards for membership in District 50. "In short order, 386 of Tungsten's approximately 400 employees signed up with District 50. Of these 386, 269 who had been members of Stone Workers also signed forms to sever relations with that union and cancel their dues check-off authorizations held by the Company." Appendix p. 48a.

About the middle of October, 1952, District 50 representatives conferred with James R. Sweet, Vice-President and General Manager of Tungsten, informed him of their union's majority status at Tungsten, explained their union's avoidance of National Labor Relations Board facilities and offered to have District 50's status verified through the medium of some other disinterested party, such as local ministers and the North Carolina Department of Labor. "There was, of course, no offer or request for the membership lists to be handed over directly to Tungsten." Appendix p. 48a.

E. B. Foreman, appointed administrator of the Tungsten Local by the President of the Stone Workers International Union, came to Tungsten shortly thereafter and, "Inquiry among the workers convinced him that virtually all had joined District 50, and he so informed the company." Appendix 48a.

> "* * * Tungsten made no effort whatsoever to accurately evaluate the obvious situation of which it had full and ample notice. Before and during the strike Tungsten steadfastly refused to even consider that the Stone Workers Local was a defunct organization." Appendix p. 49a.

The strike began January 9, 1953, when Holleman, then President of the new District 50 Local, and James

Knight, its Secretary, were fired because they ate their lunch before the regulation noon hour.

> "On January 15, 1953, Tungsten's old contract with Stone Workers expired and District 50 formally adopted the six day old strike for the purpose of getting recognition." Appendix p. 51a.

The trial court found that a majority of Tungsten's employees was, in January, 1953, committed to District 50 and had repudiated Stone Workers. He wrote: "This unquestionably was the situation and Tungsten was on notice." Appendix, p. 55a.

The trial court further found: "Tungsten really makes no attack on the large 'sign up' which had been obtained by District 50 and there is no vestige of proof or even a suggestion that the signatures on the cards were not authentic. * * * So that, it is my view that Tungsten was free to recognize District 50 in spite of the Board's certification of Stone Workers, but Tungsten preferred a contrary course, taking the position that it would recognize only a union certified by the N.L.R.B. Such position was without justification in law, as above pointed out." Appendix p. 55a.

On appeal the United States Court of Appeals reversed the trial court basing the reversal in part on facts not found by the trial court and which are not supported by any evidence in the record. The language is:

> " * * * Add to this the fact that the authorizations relied upon by District 50 had been obtained in association with threats of strike and violence (which materialized), and it cannot be said that Tungsten acted improperly or unlawfully in insisting upon a properly supervised secret ballot to determine the real, uncoerced wishes of its employees.

"We hold that under these circumstances Tungsten was not legally obligated to recognize District 50 as the bargaining agent of its employees, in view of the outstanding certification of Stone Workers." Appendix p. 18a.

There is not a word of testimony in the record to show that any one of the majority authorizations in the hands of District 50 on the first conference with the Vice-President of Tungsten on October 16, 1952 had been obtained in association with threats of strike and violence.

The Court of Appeals further decided: "We hold that under the facts of this particular case the deliberate withholding from the Board, * * * of these 'facts' relied upon as a defense below, binds District 50, and prevents it from successfully defending this suit on the ground that at the times in question Stone Workers was not the certified bargaining agent of Tungsten's employees within the meaning of Section 303 (a) (3). As a consequence, the strike, and District 50's participation therein, were unlawful". Appendix p. 26a.

In the appendix to its petition for rehearing, District 50 gave its justification for not putting on evidence at the hearing before the Board. Appendix, pp. 38a-40a.

REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court and has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this court's power of supervision. The departure is twofold: The Court of Appeals has imposed upon a labor

union charged before the Board with an unfair labor practice in violation of Sec. 8 (b) (4) (C) of the Act the duty putting on evidence in defense of the charge. There is not a word in the National Labor Relations Act, as amended, imposing such a duty. We have not been able to find a decision of any other court in America which imposes or requires such a duty.

2. In the second place, the Court of Appeals has amended the Act of Congress by adding a penalty to the Act which is nowhere to be found in any provision of the Act. The added penalty is the forfeiture by the union of its defense to a damage suit brought under Sec. 303 (a) (3) and (b) by failure to introduce evidence of that defense in the unfair labor practice proceeding before the Board. We have not been able to find another case in America which inflicted this penalty, nor did the Court of Appeals cite any case or law in justification of this penalty.

3. The opinion of the Court of Appeals deprives this petitioner of due process of law guaranteed it by the Fifth Amendment to the Constitution of the United States. The Court has placed upon this petitioner a duty not required by law and denied it a defense because it did not perform that non-legal duty and has deprived it of a trial according to accepted principles of res judicata.

4. The decision of the Court of Appeals interweaves and intertwines two provisions of the Act which Congress deliberately kept separate. Sections 8 (b) (4) (C) and 303 (a) (3) and (b) are not reciprocally dependent. The language of Mr. Justice Douglas, writing for this court, in *Longshoremen* v. *Juneau Spruce Corp.*, 342 U. S. 237 beginning at p. 243, makes clear the difference between Sections 8 (b) (4) (D), which gives rise to an

administrative finding, and 303 (a)(4) which gives rise to a suit for damages, applies with equal force to Sections 8 (b)(4)(C) and 303 (a)(3) and (b).

The Court of Appeals states, "It may be granted that there was no estoppel, as that term is technically defined, in the decision of the Board." Appendix, p. 24a. Then the court in effect holds that there was an estoppel by the deliberate withholding from the Board of the facts relied upon as a defense to the damage suit. Appendix, p. 26a. The opinion is either based on estoppel or the principles of res judicata, or both. There is no estoppel because there is no representation by this petitioner which Tungsten acted upon or relied upon to its detriment.

The doctrine of res judicata arises from the combination of three elements; namely: (1) the parties must be the same; (2) the subject-matter must be the same; (3) the issues must be the same. See *Hardison* v. *Everett*, 192 N.C. 371, 135 S.E. 288, and *McInturff* v. *Gahagan*, 193 N.C. 147, 50 C.J.S., p. 18. The Labor Board proceeding was under the control of the General Counsel of the Board who, in the theory of the law, was acting in the public interest and not in behalf of Tungsten Mining Corporation. The party plaintiff before the Board was the General Counsel on behalf of the Board. The party plaintiff in the damage suit was simply Tungsten Mining Corporation.

The analysis of a Board proceeding by Mr. Chief Justice Hughes in *Amalgamated Utility Workers* v. *Consolidated Edison Company*, 309 U.S. 261 at 265 demonstrates this essential difference in parties.

Clearly the two actions did not seek the same relief. One sought to stop an unfair labor practice; the other

sought a money judgment for the corporate plaintiff. See *Boeing Airplane Co.* v. *Aeronautical Industrial District*, 91 F. Supp. 596, affirmed 188 F. 2d 356, certiorari denied 342 U.S. 821.

In innumerable cases trial judges have refused to let plaintiffs in a tort action show the conviction of the defendant in a recorder's court for reckless driving, or in a criminal court for assault and battery.

The paragraph of the opinion dealing with "deliberate withholding from the Board" concludes with the sentence, "As a consequence, the strike, and District 50's participation therein, were unlawful". Appendix p. 27a. What strange reasoning! The present does not influence the past. The failure to put on evidence on March 3rd does not determine the quality of the actions completed on February 3rd preceding.

On the trial of the damage suit, the trial court had the task of determining the true state of things from January 9 to February 3, 1953. One problem was to determine the force and effect of subsequent events upon a certification six (6) years old and not to determine what the Board later thought was the effect of those subsequent events and changes. The Act does not make the District Court a mere accountant to compute damages. Hence the averments of paragraph 10 of the Complaint (Plaintiff's Appendix, p. 4) were stricken by the trial court (Defendant's Appendix, p. 28).

5. The fourth reason for granting the writ is the failure of the Court of Appeals to follow Rule 52 (a) of the Federal Rules of Civil Procedure, which provides: "In all actions tried upon the facts without a

jury * * * findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". Appendix p. 778.

The failure of the Court of Appeals to follow the admonition of Rule 52(a) is not in accord with decisions of this court. (See *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485 at 495-496 and *United States* v. *Yellow Cab Co.*, 338 U.S. 338 at 341-342).

The trial court had two opportunities to observe the demeanor and to judge the credibility of the witnesses. The trial court clearly believed on the trial of the damage suit that the witness Foreman, former Administrator of the defunct union, was telling the truth when he said he had informed the Company that virtually all their employees had joined District 50. (Defendant's Appendix pp. 102-103).

Despite the District Court's factual findings that Tungsten had knowledge of the true situation, the Court of Appeals in effect supplies Tungsten with a doubt and, therefore, finds it was entitled to insist "upon a properly supervised secret ballot to determine the real, uncoerced wishes of its employees". This nonexistent doubt is supported by nonexistent threats of strike and violence in obtaining authorizations.

Under the controlling facts as found by the trial court, Tungsten had no doubt of the majority status of District 50 as representative of its employees. In *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 at 69, this court stated: "In the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the

employer's denial of recognition of the union would have violated Sec. 8 (a) (5) of the Act".

At Page 75 of that opinion this court stated: "Under those sections and by virtue of the conceded majority designation of the union, the employer is obligated to recognize the designated union". Certain knowledge by the employer of majority designation surely equals a conceded majority.

While the instant case involves the question of a union's right to strike when another union has been certified and the *Arkansas Oak Flooring Company* case involved the right to strike where no union had ever been certified, that opinion announces principles of law which must be borne in mind in deciding this case. It makes clear the employer's duty to bargain with the majority-chosen representative when that employer has no doubt.

6. We submit the second question presented must be answered in the negative under accepted principles of statutory construction. The language of 303 (a) (3) necessarily implies the existence of a union to be certified. For the certification to continue effective, the union must continue to function. Just as there cannot be a gift without a donee nor a trust without a res, so there cannot be a live certification without a live union.

Under the Wagner Act, the Board held that the one-year certification period would not apply where the certified bargaining unit no longer exists or is inactive (See *Public Service Electric and Gas Company*, 59 NLRB 325 and *Nashville Bridge Company*, 49 NLRB 629).

Since the passage of the Taft-Hartley Law, the Board has recognized that a certified union may become defunct (See *WTOP, Inc.* 114 NLRB 194). The Board has held that absent unusual circumstances, the majority status of a certified union is conclusively presumed to continue for one year after certification and thereafter, the presumption is rebuttable and the employer in good faith may question the union's majority status. (See *District 50, United Mine Workers of America*, 106 NLRB 903 at 906 (Appendix p. 65a); *Celanese Corporation of America*, 95 NLRB 664 at 672 and 673; *N.L.R.B.* vs *Proof Co.* 242 F (2d) 560). In the case of *Brooks* vs *N.L.R.B.*, 348 U.S. 96, this court held that the employer was obligated to honor the certification for a reasonable period of time, normally one year.

We recognize that there is a difference between an employer justifying a refusal to bargain with a certified union because of unusual circumstances and a union justifying a strike where another union has been certified. The two are not identical, but the reasoning which protects the employer is persuasive. If the certification were effective under unusual circumstances, the employer would have no defense for his refusal to bargain. If the certification has ceased to be effective in the one case, why should it not be equally ineffective in the strike situation?

The Act does not set limits on the lifetime of a certification. Neither does the Act give perpetual existence to a certification. Absolutes are not to be sought after. In fact, the policy of an Act is to be studied in order to do away with absolutes. (See *Cox* vs *Roth*, 348 U.S. 207 at 209)

The language of Section 303 (a) (3) cannot be considered in isolation. The dominant purpose of the Act should be kept in mind (*U.S. vs C.I.O.*, 335 U.S. 106). It is not the mere letter of the law but the spirit which should be considered (*Holy Trinity Church v. U.S.*, 143 U.S. 457).

This court has recognized that statutes should be construed so as to carry out a remedial enactment in accord with the purpose of Congress. (See *Vermilya-Brown Co. vs Connell*, 335 US 377 at 390).

Careful consideration of the declaration of policy in Section 1 and the language of Section 7 shows that a dominant purpose of the Congress was to give workers full freedom of choice in the selection of the representatives for purposes of collective bargaining. The language of Section 13 protects the right to strike, except as specifically provided for in the subchapter in the Act.

The effect of the decision of the Court of Appeals is to deprive employees of that full freedom of choice which Congress took such great care to protect. The Stone Workers' union was unquestionably defunct. No fiction of survival should operate to subject the choice of living employees to the administrator of this defunct union. This case is not on all four's with *John L. Parks vs Atlanta Printing Pressmen*, 243 F(2d) 284. Judge Brown of the United States Court of Appeals for the Fifth Circuit wrote with strong feeling of the danger confronting an employer who had to make a decision. No doubt existed in the instant case that would create any danger of decision. We also believe that the decision in the *Parks case* goes much too far in denying to employees the right to

change their representative. Such a doctrine would reach an absurd result in many cases and would do that in the instant case.

CONCLUSION

WHEREFORE for the foregoing reasons we respectfully submit that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CRAMPTON HARRIS
1018-19 First National Building
Birmingham 3, Alabama

CHARLES P. GREEN
Louisburg, North Carolina

YELVERTON COWHERD
900-15th Street, N. W.
Washington 5, D. C.

ALFRED D. TREHERNE
900-15th Street, N. W.
Washington 5, D. C.

Counsel for Petitioner

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURT CIRCUIT

No. 7293.

TUNGSTEN MINING CORPORATION, *Appellant*,

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.

(Argued November 20, 1956. Decided February 12, 1957.)

Before PARKER, Chief Judge, SOBELOFF, Circuit Judge, and R. DORSEY WATKINS, District Judge.

Whiteford S. Blakeney (E. L. Fuller, Jr., and A. W. Gholson, Jr., on brief) for Appellant, and Banks Arendell, Yelverton Cowherd and Charles P. Green (Alfred D. Treherne and Armistead J. Maupin, on brief) for Appellee.

R. DORSEY WATKINS, District Judge:

Plaintiff-appellant Tungsten Mining Corporation (Tungsten) sued Defendant-appellee District 50, United Mine Workers of America (District 50) for damages under Section 303 of the Labor Management Relations Act, 29 U.S.C. Sec. 187 (a) (3) and 187 (b). Tungsten claimed

that in January 1953 District 50, through an unlawful strike, caused damage to Tungsten's business; and that the strike was unlawful because one of its objects was to force Tungsten to recognize District 50 as bargaining representative of Tungsten's employees, although at that time United Stone & Allied Product Workers of America, C.I.O. (Stone Workers) was then the labor organization certified by the National Labor Relations Board (Board) as exclusve collective bargaining representative for such employees. At the conclusion of the trial before the district judge, without a jury, judgment was entered in favor of District 50.

In April 1946 the Board conducted an election among Tungsten's employees and issued a certification in favor of Stone Workers. Shortly thereafter, Tungsten and Stone Workers executed a collective bargaining agreement which was followed by an uninterrupted succession of such agreements, the fourth of which was effective until January 15, 1953, and from year to year thereafter unless modified or terminated by 60 day notice. In October 1952 Holloman, an employee[1] in Tungsten's mines, with the help of District 50, organized the Tungsten Mining Local of District 50 at the Tungsten plant and Holloman was elected president of the new local.

While Tungsten Mining Local was being organized and thereafter, meetings were held with Tungsten's employees. At these meetings representatives of District 50 made a series of speeches in which they pointed out that District 50 did not use[2] the facilities of the Board to settle repre-

[1] He had been with Tungsten approximately two years, having started in a supervisory capacity. He began working in the mine, and joined Stone Workers about September-October 1952.

[2] United Mine Workers has consistently declined to comply with the filing provisions of 29 U.S.C. Sec. 159(f), (g) and (h). This precluded the parent, and District 50, from asking relief from, or being certified by, the Board. It did not, however, preclude District 50 from representing employees or acting as bargaining rep-

sentation questions and that District 50 would probably resort to a strike or series of strikes with picketing if it could not obtain recognition in any other way. After one of these meetings, statements were made by some of the employees that efforts to pass through a picket line might result in houses being dynamited "and things like that."

In October 1952 Robert Fohl, Regional Director of District 50, and Walter A. Shuey and Lucien L. Wood, Field Representatives of District 50, came to Tungsten and conferred with the vice president and general manager of Tungsten. These District 50 representatives asserted that their Union held authorizations from a majority of Tungsten employees. They stated that District 50 did not use the Board's facilities, but offered to have District 50's status verified through other media. They explained that where they were unsuccessful in obtaining representation by other means, they would resort to strike. Purported lists of requests that Stone Workers "no longer be the certified Bargaining Agent at the Tungsten Mining Corporation," of the withdrawal of check-off authorizations on behalf of Stone Workers, and of applications for membership in District 50, were mailed to Tungsten on January 21, 1953.

Shortly after the conference with the District 50 representatives, Tungsten examined its files and finding unrevoked dues deductions authorizations in favor of Stone Workers executed by more than a majority of employees in the unit, advised District 50 that Stone Workers had been certified by the Board as bargaining agent; that this certificaton had never been rescinded; and that Tungsten would continue to recognize Stone Workers until some

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resentative for them. United Mineworkers of America v. Arkansas Oak Flooring Co., 1956, 351 U.S. 62, 76 S. Ct. 559, 100 L. Ed. 514; District 50, United Mine Wkrs. v. National Labor Rel. Bd., 4 Cir. 1956, 234 F. 2d 565, 571. This is immaterial upon the question of whether District 50 was at liberty to participate in a strike for recognition, if at the time Stone Workers was the certified representative.

other bargaining agent had been properly certified after an election duly held under the National Labor Relations Act. On October 30, 1952, District 50 wrote the Board, with a copy to Tungsten, reviewing in part the claims of District 50 and Tungsten, and concluding:

> "We are merely advising your Board of this situation as a matter of record because this Organization intends to fully support and protect the interests and desires of the workers of this Mining Company, by every moral and legal means at our disposal, including that of strike action, if necessary."

In November 1952 Stone Workers notified Tungsten that it wished to terminate the existing contract and proposed that a new contract be negotiated. Because of "raids" on the membership of Stone Workers, an administrator appointed pursuant to the Constitution of Stone Workers International Union, was sent to the plant to endeavor to bring the employees back into Stone Workers' organization. Largely[3] through the administrator's efforts, a new contract between Tungsten and Stone Workers was executed on December 18, 1952, to become effective on January 15, 1953, the terminal date of the current contract. On January 9, 1953 Tungsten discharged two employees, including Holloman, for alleged violation of working rules. They spoke to other employees of the company and a strike began at 6 p.m. At 7 p.m. representatives of District 50 arrived at the Tungsten plant. On January 10, Holloman and Fohl prepared a press release describing the strike as due to a spontaneous walk out because of the discharges which they attributed to union activity on behalf of District 50 by the discharged employees. The release also stated:

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[3] The evidence is in conflict as to whether or not this agreement had been reached in New York, without consideration by Stone Workers other than through the administrator, or whether it was the result of real bargaining at Tungsten, in which other representatives of Stone Workers participated.

> "In addition to a strike for the two discharged workers, it will also be a strike for recognition of the United Mine Workers of America and a new contract with proper wages, hours and working conditions from January 15, 1953, on."

"On strike" signs were made available by District 50 fo the striking employees and after January 15, signs indicating that the strike was for recognition of District 50 were also supplied.

The strike was accompanied by violence, including the discharge of fire arms and dynamiting of a power pole. On January 14, 1953 the Superior Court of Vance County, North Carolina, issued a temporary restraining order directed against District 50, Holloman and others, enjoining interference with free ingress and egress; assaults, threats, abuse or damage; and also set up provisions with respect to picketing. This order was on the evening of January 14 read by Wood to the strikers, and Wood, in conjunction with State Police, laid out the picket stations in accordance with the order of court.

On January 15, 1953 Tungsten's old contract with Stone Workers expired and District 50 formally adopted the strike for purposes of recognition Strike headquarters were established at a rented building some distance from the mine. Bail was furnished through District 50 for persons arrested for acts of violence during the course of the strike. An injunction issued by the district court on February 3, 1953, to which further reference is made in this opinion, brought an end to the strike.

Tungsten's suit was brought under U.S.C. Title 29, Sec. 187, the pertinent parts of which read as follows:

> "(a) It shall be unlawful, for the purposes of this section only . . . for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike . . . where an object thereof is—
>
> * * * * *

> "(3) forcing or requiring any employer to recognize or bargain with a particular labor organization, as the representative of his employees if another labor organization has been certified as the representative of such employees . . .
>
> . . . . . .
>
> "(b) Whoever shall be injured in his business or property by reason or [of] any violation of subsection (a) of this section may sue therefor in any district court of the United States . . ."

Whether or not District 50 induced the employees of Tungsten initially to strike, it certainly encouraged them in the strike, and was itself engaged in the strike at least after January 14, 1953.[4] One of the purposes of the strike was to force or require Tungsten to bargain with District 50 as the representative of Tungsten's employees. During all the time in question, another labor organization, Stone Workers, had been certified by the Board as the exclusive collective bargaining representative of Tungsten's employees. That certification had not and has not been revoked.

The case would seem to come literally and exactly within the coverage of section 187 (a) (3) supra. Nevertheless the district court entered judgment for District 50 saying:

> "I am adjudging that District 50 is not liable to Tungsten because Stone Workers, despite its certification, was no longer a going concern, nor did it represent the overwhelming majority of Tungsten's employees—a situation of which Tungsten had every reason to be well aware . . ."

The proposition that despite the provision of section 187 (a) (3) making unlawful a strike having as "an object"

[4] The state court injunction of January 14, 1953, enjoined District 50, among others, from interfering with access to Tungsten's property; from the use of violence or threats; and from having more than six pickets posted at specified locations.

the forcing or requiring of any employer to recognize or bargain with a particular union if another labor organization has been certified as the representative of employees, such strike is not unlawful if the certified union (after one year from its certification) has ceased to represent a majority of the employees in the bargaining unit, was based completely and exclusively upon the decision in *Kennedy, Regional Director, National Labor Relations Board* v. *Warehouse & Distribution Workers Union, Local 688*; 37 L.R.R.M. 2496, (D.C. Mo., Jan. 27, 1956). That was an acton brought to enjoin an unfair labor practice proscribed by U.S.C. Title 29, Sec. 158 (b) (4) (c), the language of which is identical with section 187 (a) (3).

In the Kennedy case Coca-Cola Bottling Company Salesmen Association (Association) was duly certified as the exclusive bargaining representative of the employees of Coca-Cola Bottling Company of St. Louis, Missouri (Coca-Cola). A collective bargaining agreement was entered into between the Association and Coca-Cola on July 17, 1953 with an expiration date of November 1, 1955. Negotiations for a new contract were begun in June 1955 but no agreement was reached. On September 2, 1955, Warehouse & Distributors Workers Union, Local 688, (Local 688) filed with the National Labor Relations Board a petition for the election of a collective bargaining representative of the employees of Coca-Cola. Hearings on the petition here held but on October 25, 1955 before a decision had been handed down by the Board, Local 688 made demands on Coca-Cola for immediate recognition as the collective bargaining representative of the employees in Association, the certified unit, and further demanded that Coca-Cola negotiate a new agreement with Local 688 on the threat of a strike and picketing to enforce these demands. A strike was called by Local 688 on November 9, 1955 and pickets were maintained.

Association continued to function after October 24, 1955; Coca-Cola continued deduction of Association's mem-

bership dues from Coca-Cola employees wages and Association accepted such payments. Coca-Cola was at all times in possession of written authorizations for the check off of Association dues from a very substantial majority of Coca-Cola's employees, which authorizations had not formally been revoked in writing.

The court in the Kennedy case also found that by October 24, 1955, the Association had lost the support of a majority of the employees in the unit; that a majority had designated Local 688 as their bargaining agent; and that before the strike Coca-Cola, "while it may not have been convinced that" Local 688 "represented a majority of employees in the unit, had good cause to doubt, and did doubt, that the Association retained the support of a majority."

The crux of the decision is found in conclusions of law nos. 4, 5, and 6, quoted in full (except for citations) by the district court in this case, and conclusion no. 7, as follows:

> "4. Since the relief sought by petitioner is being denied on other grounds, it is not necessary to consider whether the Association's status, or its representation of the employees in the unit, had deteriorated to such an extent that the Association's certification should for this reason be regarded as totally ineffective. Cf. Public Service Electric & Gas Co., 59 N.L.R.B. 325, 15 LRRM 152; WTOP, Inc., 114 N.L.R.B. No. 194, 37 LRRM 1143; National Gas Co., 106 N.L.R.B. 819, 32 LRRM 1561; but cf. Cosentino v. District Council, 107 F. Supp. 235, 30 LRRM 2683 (D.C.P.R.).
>
> "5. Because the Association had, by November 9, 1955, when the Association's certification was more than one year old, lost the support of a majority of the employees in the bargaining unit, and the Company had at least a bona fide doubt that the Association retained the support of a majority, the Company was then no longer required by law to bargain collectively with the Association, but was free to 'refuse to bargain further with it.' Brooks v. National Labor Relations

Board, 348 U.S. 96, 104, 35 LRRM 2158; Celanese Corp., 96 N.L.R.B. 644. An object of Respondent's conduct, therefore, was to require the Company to violate its duty of neutrality between the Association and Respondent, e.g., National Labor Relations Board v. Indianapolis Newspapers, Inc., C.A. 7, 1954, 210 F.2d 501, 503, 33 LRRM 2536, not to require the Company to violate its duty to bargain with the certified union.

"6. Section 8(b) (4)-(c) of the Act proscribes strikes 'having as their purpose forcing any employer to disregard his obligation to recognize and bargain with a certified union and in lieu thereof to bargain with or recognize another union.'[5] H. Conf. Rep. No. 510, 80th Cong., 1st Sess.; see also S. Rep. No. 105, 80th Cong., 1st Sess.; 93 Daily Cong. Rec 7686; id. at 1910-1912, 3954. That section does not, as the Board contends, proscribe strikes directed toward compelling the employer to violate his duty of neutrality between two competing unions, nor does it proscribe strikes to gain an object (recognition) which could alternatively be gained, eventually, by means of the peaceful processes of the Board's election procedures, for it is not written in those terms, and there is no rational relation between these circumstances and the criterion established by the Act: whether 'another labor organization has been certified as the representative of (the) employees under the provisions of Section 9.' A strike is not rendered unlawful by the presence of such circumstances. See, e.g., Perry Norvell Co., 80 N.L.R.B. 225, 23 LRRM 1061; Tungsten Mining Corp., 106 N.L.R.B. 903, 909, 32 LRRM 1576; Address of former General Counsel Bott, May 13, 1954, 34 LRRM 78, 79; cf. S. Rep. No. 105, 80th Cong., 1st Sess., p. 22; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43, 44; 98 Daily Cong. Rec. 4557, 4562-63. Accordingly Section 8(b) (4) (c) does not proscribe the conduct of Respondent in this case.

[5] The quotation is not of the statutory provision, but from House Conference Report No. 510, 80th Cong., 1st Sess. The consequence of ignoring the statutory language is discussed in detail below.

"7. The fact that Respondent's representation petition was already pending at the time of the strike does not render Respondent's conduct unlawful, because this circumstance has no bearing upon the terms of Section 8(B) (sic) (4) (C), and a contrary rule would discourage, rather than encourage, resort by the union to the peaceful election procedures of the Board."

After referring to these conclusions, the district judge in this case then pointed out that in *District 50, United Mine Wkrs. v. National Labor Rel. Bd.*, 4 Cir 1956, 234 F. 2d 565, this court had stated, with reference to a situation in which there was no certified union, that the maintenance of neutrality does not "*require*[6] that the employer refuse to recognize a bargaining agent chosen by a majority of his employees if such majority is so clearly established that there can be no true question with regard thereto." (234 F. 2d at p. 570). At almost the same time the Supreme Court, in another case not involving a certified union, the company's employees never having been represented by a union, held that upon proof of a majority "The company can, if it so wishes, lawfully recognize the union as the employees' representative." *Mine Workers v. Arkansas Flooring Co.*, 1956, 351 U.S. 62, 75, 76 S. Ct 559, 100 L. Ed. 477.[7]

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[6] Emphasis here and throughout supplied, unless otherwise indicated.

[7] The language immediately following is: "That being so, there is no reason why the employees, and their union under their authorization, may not, under section 13, strike,[13] and, under section 7, peacefully picket the premises of their employer to induce it thus to recognize their chosen representative. See West Texas Utilities Co. v. Labor Board, 87 U.S. App. D.C. 179, 185, 184 F.2d 233, 239, and the other cases cited in note 6, supra.[14]" That this was spoken only in connection with the specific factual situation, in which there was no certified union, is made abundantly clear by the Supreme Court's footnote 14, reading:

"14. 'Present law in no way limits the primary strike for recognition except in the face of another union's certification.'

The district judge then referred to the "*right* of the employer" as a general rule, where the certification is more than one year old, to recognize another union holding a majority; expressed the opinion that "Tungsten was at *liberty*" to recognize District 50 upon clear proof of majority representation by it; and that Tungsten was "*free to recognize* District 50 in spite of the Board's certification of Stone Workers, but Tungsten preferred a contrary course, taking the position that it would recognize only a union certified by the N.L.R.B."

The district court then paraphrased the Kennedy decision and held that the object of District 50 was not "to force Tungsten to disregard its obligation to Stone Workers" but "to get Tungsten to realize and accept the fact that it was at that time *under no obligation* to Stone Workers . . . " This, the court held, relieved District 50 of liability under section 187 (b)—although the strike was, at least in part, for recognition.[8]

In *Parks* v. *Atlanta Printing Pressman & Assistants Union No. 8*, 30 Labor Cases, No. 70,095 (D.C. Ga., June 26, 1956), the court dismissed an action for damages for alleged violation of section 187 (a) (3). The court found that the certified union had been quite inactive: there had been no labor agreement for the years 1953, 1954, or 1955; no grievances had been processed; and while a wage increase had been negotiated in 1953, the certified union had not since that date attempted to bargain with the employer; and that it did not represent a majority. The court referred to the "difficult question . . . whether the defendant union

Report of the Joint Committee on Labor-Management Relations, No. 986, Pt. 3, 80th Cong., 2d Sess. 71; S. Report No. 105, 80th Cong., 1st Sess. 22; H. R. Conf. Report No. 510, 80th Cong., 1st Sess. 43."

[8] The district judge found: "On January 15, 1953, Tungsten's old contract with Stone Workers expired and District 50 formally adopted the six day old strike *for the purpose of getting recognition.*"

in this case was justified in calling the strike for recognition, more than a year after the other election, without obtaining a certification by the National Labor Relations Board of its status." The court referred to the Fifth Circuit decision in *National Labor Relations Board* v. *International Furniture Co.*, 212 F. 2d 431, that "the employer has a right to refuse recognition after the year [of certification] has passed where the refusal arises from a belief in good faith that the union does not represent a majority of the employees." (212 F. 2d at p. 433). The court also cited the Kennedy case, supra, and *Brooks* v. *National Labor Relations Board*, 1954, 348 U.S. 96, 104, 75 S. Ct. 176, 99 L. Ed. 125, and the statement by the Supreme Court that:

> "The Board has ruled that one year after certification the employer can ask for an election, or if he has fair doubts about the union's continuing majority, he may refuse to bargain with it. This too is a matter appropriately determined by the Board's administrative authority."[9]

The court in the Parks case recognized that "There is much language in" *National Labor Relations Board* v. *Sanson Hosiery Mills, Inc.*, 5 Cir. 1952, 195 F. 2d 350 "leading one to believe that the certification must be respected even after a year has passed." The court attempted, however, to distinguish the case on the ground that it related to a situation arising at a time when certification was held inviolable for two years.

In the Kennedy case; in the court below; and to some extent in the Parks case, the courts proceed upon the theory

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[9] The Supreme Court's footnote to this quotation is:

> "18. Celanese Corp. of America, 95 N.L.R.B. 664. The Board has on several occasions intimated that even after the certification year has passed, the better practice is for an employer with doubts to keep bargaining and petition the Board for a new election or other relief. Id., at 674; United States Gypsum Co., 90 N.L.R.B. 964, 966-968; see also J. P. O'Neil Lumber Co., 94 N.L.R.B. 1299."

that if, after the period of one year, substantial evidence exists that the certified union no longer represents a majority, the employer *may*, without awaiting formal decertification, refuse further to deal with the certified union; that if there is substantial evidence that a rival union does represent a majority, the employer *must* on demand of such rival cease recognizing the certified union and deal with the rival; and if he does not, the rival can cause or participate in a strike to bring that condition about; but that this is not "forcing or requiring any employer to recognize or bargain with" the rival union, whether or not the rival union has been and is the certified collective bargaining agent.

We are not impressed with the inevitability of this reasoning or conclusion. It is founded upon the quotation and use by the court in the Kennedy case (conclusion of law no. 6, supra) of language from a House Conference Report instead of the language of the Act as passed. The court says that "Section 8 (b) (4) (C) of the Act proscribes strikes 'having as their purpose forcing any employer to disregard his obligation to recognize and bargain with a certified union and in lieu thereof to bargain with or recognize another union' . . ." The language of 8 (b) (4) (C) (29 U.S.C. sec. 158 (b) (4) (C)) in haec verba proscribes strikes "forcing or requiring any employer to recognize or bargain with a particular organization as the representative of his employees if another labor organization has been certified as the representative of such employees. . ."

The risk in glossing clear and simple language by reference to legislative history is strikingly illustrated by the substitution of words from House Conference Report No. 510 for the statutory language. Later, in speaking of the Senate amendment (in which the House concurred) this same House Conference Report No. 510 refers to the investigation by the Board of "any charge of unfair labor

practice within the meaning of paragraph (4) (A) (B) or (C) of section 8(B) of the conference agreement, which deals with certain boycotts and with certain strikes to *force recognition of uncertified labor organizations*. . . ."[10] Finally, in a footnote to the decision in *Mine Workers* v. *Arkansas Flooring Co., supra*, 351 U.S. at p. 75, the Supreme Court stated: "Present law in no way limits the primary strike for recognition *except in the face of another union's certification*," citing, among other references, this same House Conference Report No. 510.

The Fifth Circuit flatly held in *National Labor Relations Bd.* v. *Sanson Hosiery Mills*, 1952, 195 F. 2d 350, cert. den. 1952, 344 U.S. 863, 73 S. Ct. 103, 97 L. Ed. 669, that "a certification, when lawfully made, must be respected by the employer until changed conditions are reflected by a later ruling by the Board altering or setting aside the certification. This is true, even though the bargaining agent so designated has lost its majority representation of employees . . . "; "Nor can the employer decide for itself whether the Union has lost its bargaining status, and deciding that it has, refused to deal with it further. Whether or not the Union has lost that status is for the Board to determine upon orderly statutory procedure. *N.L.R.B.* v. *Prudential*, 6 Cir., 154 F. 2d 385, headnote 10. Meanwhile it is the duty of the employer to deal with the duly certified union." (195 F. 2d at 352-353).[11]

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[10] U.S. Code Cong. Serv., 80th Cong. 1st Sess., p. 1163.

[11] This decision was followed in several cases by the Fifth Circuit until its decision in National Labor Relations Bd. v. International Furniture Co., 1953, 212 F. 2d 431, where in enforcing an order of the Board requiring an employer to bargain in good faith with the certified union, and the only one in the picture, where the employer as an afterthought had raised the question of loss of majority representation, that court said (at p. 433):

> "While there is a presumption that the majority status of the union continues after the year of certification, the employer has a *right to refuse recognition* after the year has passed

In *Teamsters Union and Lewis Food Company*, 115 N.L.R.B. 890, 37 LRRM 1421 (March 22, 1956), the Board issued a cease and desist order from engaging in unlawful picketing for recognition. On July 22, 1952, Association of Pet Food Manufacturers Employees was certified as bargaining representative of employer's production and maintenance employees. On September 11, 1952, a collective bargaining contract was executed, to expire in 1957. In August 1954, Teamsters Union began organizing employees in the certified bargaining unit, and by August 18 claimed a majority, demanded recognition and a contract, and stated that employer should join with the union in filing a petition with the Board to decertify the Association. Upon failure of the employer to comply, a strike was called. The Board found this to be a violation of section 158 (b) (4) (C) since it was designed to force the employer "to recognize" Teamster's Union "and bargain with it at a time when the unit of employees for which" Teamsters Union "sought recognition was covered by an outstanding certification existing in the Association." The Board also affirmed the rejection of Teamsters Union's affirmative defense that the strike was not violative of section 158 (b) (4) (C) "because the Association allegedly was illegally dominated at the time of its certification . . ." Presumably this, as loss of majority representation, while the basis for a decertification, could not in the Board's opinion permit a rival union to strike while the certification was outstanding.

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where the refusal arises from a belief in good faith that the union does not represent a majority of the employees . . ."

In Cone Brothers Contract. Co. v. National Labor Rel. Bd., 5 Cir. 1956, 235 F. 2d 37, the employer was so doubtful concerning the validity of the Board-held election that it took "the forthright, albeit risky, course of declining to bargain as the means of testing its convictions . . . But in doing this, the Employer anticipated, as it came to pass, that the soundness of its claim of illegality would be determined in the inevitable (and present) Complaint Proceeding and not by self-help, which would be condemned. . . ."

But even if we should assume, concede, or agree, that after the first certification year an employer, if there be substantial evidence that the certified union has lost majority representation, *may* recognize a rival union, "may" is certainly not the equivalent of "must". To hold that an employer must cease recognition of a certified union, and recognize a rival, would seem totally inconsistent with the representation provisions of 29 U.S.C. Sec. 159 (c) (1) (B) under which a petition may be filed "by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the" exclusive representative.[12] It also would be inconsistent with the admonitory language of the Supreme Court in *Brooks* v. *National Labor Relations Board*, 1954, 348 U.S. 96, 75 S. Ct. 196, 99 L. Ed. 125, where the court said, at pages 103-104:

> "Petitioner contends that whenever an employer is presented with evidence that his employees have deserted their certified union, he may forthwith refuse to bargain. In effect, he seeks to vindicate the rights of his employees to select their bargaining representative. If the employees are dissatisfied with their chosen union, they may submit their own grievance to the Board. If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit.[13] *Although the Board may, if the facts warrant, revoke a certification* or agree not to pursue a charge of an unfair labor

[12] It might also completely eliminate the invocation of sec. 159 (c) (1) (A) under which a petition may be filed "by an employee or group of employees . . . alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, *which has been certified* or is being currently recognized by their employer as the bargaining representative, is no longer a representative . . ."

[13] At the time the strike occurred, Tungsten officials were conferring at the Winston-Salem Regional Office of the Board, "to talk with them about this situation . . ."

practice, *these are matters for the Board; they do not justify employer self-help or judicial intervention.* The underlying purpose of this statute is industrial peace. *To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents* and has fixed the spacing of elections, with a view of furthering industrial stability and with due regard to administrative prudence.

"We find wanting the arguments against these controlling considerations. In placing a nonconsenting minority under the bargaining resposibility of an agency selected by a majority of the workers, Congress has discarded common-law doctrines of agency. It is contended that since a bargaining agency may be ascertained by methods less formal than a supervised election, informal repudiation should also be sanctioned where decertification by another election is precluded. This is to make situations that are different appear the same."

The facts in the present case point up the risks inherent in the application of the theory that the employer would be entitled, or required, itself to determine correctly the wishes of its employees to reject a certified bargaining agent. It may be clear that a substantial majority of Tungsten's employees on paper favored District 50. Against this must be placed the facts that until January 22, 1954, no written evidence in support of this claim was in Tungsten's hands—indeed, it held unrevoked dues deduction authorizations in favor of Stone Workers, executed by more than a majority of its employees; it had paid in January 1954 the amount of such deductions to the administrator of Stone Workers for December 1953 deductions; the administrator of Stone Workers testified that upon coming to the plant he tried to rebuild that union from the raids upon it, and thought he had some success from the start; in fact, Stone Workers continued in existence down to the time of trial, February, 1956, at which time it had a contract with Tung-

sten, negotiated at the end of 1955, expiring January 15, 1958, and represented between seventy-five and eighty percent of Tungsten's employees; and, in proceedings before the National Labor Relations Board in 1954, Stone Workers was found to be the certified and functioning representative of Tungsten's employees. Add to this the fact that the authorizations relied upon by District 50[1] had been obtained in association with threats of strike and violence (which materialized), and it cannot be said that Tungsten acted improperly or unlawfully in insisting upon a properly supervised secret ballot to determine the real, uncoerced wishes of its employees.

We held that under these circumstances Tungsten was not legally obligated to recognize District 50 as the bargaining agent of its employees, in view of the outstanding certification of Stone Workers.

The appropriate Regional Director for the Board brought suit pursuant to 29 U.S.C. Sec. 160. (*l*) in the United States District Court for the District of North Carolina, for an injunction against Tungsten Local Union, United Mine Workers of America, Holloman, Fohl and District 50, United Mine Workers of America, "pending final adjudication of the Board of the matters involved." The court issued a decree, dated February 3, 1953, "upon consideration of the petition, respondents' oral answer thereto in open court, testimony, exhibits, evidence, oral arguments and briefs" from which it appeared to the satisfaction of the court "that there is reasonable evidence to believe that respondents have engaged in and are engaging in conduct in violation of Section 8(b), sub-section (4) (C)" of the National Labor Relations Act. The respondents were accordingly "restrained and enjoined, pending the final adjudication of this matter by the National Labor Relations Board" from:

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[1] The reported cases, Board and court, attest the mercurial character of union membership, particularly where a new union enters the lists.

"Engaging in, or by picketing, order instructions, directions, appeals, threats, intimidation, coercion or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, inducing or encouraging the employees of the Tungsten Mining Corporation, or of any other employer, to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is to enforce or require the said Tungsten Mining Corporation to recognize or bargain with respondent Tungsten Local Union, United Mine Workers of America, and/or respondent District 50, United Mine Workers of America, as the collective bargaining representative of any of the employees of said corporation in the unit for which the United Stone and Allied Products Workers of America, C.I.O. has been duly certified by the Regional Director of the National Labor Relations Board as the exclusive bargaining representative under the provisions of Section 9 of the National Labor Relations Act."

Respondents were further required to prepare and deliver press releases "stating that respondents have rescinded and withdrawn their demand that the Tungsten Mining Corporation shall recognize or bargain with respondents or any of them . . . and that respondents have directed their members to cease their strike and picketing at the mine and plant of the Tungsten Mining Corporation for the prescribed object above described . . ."

The following notice was given to members of Tungsten Local, District 50 United Mine Workers of America, and for release to the press and radio:

"Notice is hereby given that on February 3, 1953, Judge Don Gilliam issued an order, a copy of which is herewith attached for your information and guidance.

"Under the order District 50, UMWA, has no choice but to direct its members at Tungsten to 'cease their strike and picketing at the mine and plant * * * to

force or require the said Tungsten Mining Corporation to recognize or bargain with * * * Tungsten Local * * * as the collective bargaining representative of any of the employees of said corporation in the unit for which another union has been certified, which District 50 or its agents hereby does as directed. Under said order District 50 is commanded to withdraw its demand for recognition by the Corporation for collective bargaining purposes, which it likewise hereby does.

District 50, UMWA, intends to comply with the terms and conditions of this order or decree.

This 3rd day of February, 1953.
District 50 United Mine Workers of America

By /s/ Robert R. Fohl
Regional Director

/s/ Cordell Holoman"

On August 26, 1953, the Board issued its Decision and Order, 106 N.L.R.B. 903, In the Matter of District 50, United Mine Workers of America; Tungsten Mining Local of the United Mine Workers of America; Robert R. Fohl, Director, Region 19, District 50, United Mine Workers of America; William Cordell Holloman, President Tungsten Mining Local, United Mine Workers of America and Tungsten Mining Corporation. Whether or not respondents (other than Tungsten) had engaged in unfair labor practices directly required a decision as to whether Stone Workers was at the time of the strike a certified union under Section 8 (b) (4) (C) of the Act, and that this question of certification status at the time of the strike was directly involved and decided, is made abundantly clear from the following quotation[15] from the decision (106 N.L.R.B. 905-906):

"As stated above, Stone Workers was certified by the Board as the bargaining representative of the

[15] Footnotes 1, 2, and 3 to the Board's decision have, to avoid confusion with the footnotes to this opinion, been renumbered a, b and c respectively, and are as follows:

Company's employees in May 1946, and the strike for the recognition of the UMW occurred in January 1953. At issue before the Board, therefore, is whether Stone Workers was, at the time of the strike, still a 'certified' labor organization within the meaning of the quoted language of Section 8(b) (4) (C).

"That language places no time limitation on the duration of a certification otherwise entitled to the proctection of that section. Nor does the legislative history of the Act reveal that the Congress intended, or even considered, such a limitation.[a]

"The Respondents, however, contend in effect that the language of the statute should not be applied in this case. They argue that Stone Workers' certification was not valid in 1953 because 'the strike and majority participation [in the UMW] rebuts any presumption of such continued existing certification.' This contention is apparently founded upon the Board's doctrine with respect to an employer's obligation to bargain under Section 8 (a) (5) of this Act. In that context, the Board has held that the majority status of a certified union, absent unusual circumstances, is conclusively presumed to continue for 1 year after certification; thereafter, the presumption is rebuttable and the employer may in good faith question the union's majority status.[b]

"We need not, however, here decide whether or not this doctrine is applicable to Section 8 (b) (4) (C) of the Act. For even were we to concede that point, the Respondents' contention still would have no merit. There is no evidence in the record to show, as the Respondents assert, that a majority of the Company's employees participated in the recognition strike. The evidence shows only that there was a strike, that the Company continued to operate its mine, and that a

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"[a] The history of the provision indicates only that Section 8 (b) (C) was intended to proscribe conduct, such as a strike, which bypasses the Board's machinery for the peaceful settlement of disputed representation questions. See H.R. Rep. No. 245, 80th Cong., 1st Sess. pp. 6, 44 (1947)."

"[b] See, e.g., Celanese Corporation of America, 95 NLRB 644."

number of employees did not participate in the strike. There is nothing else to show that UMW was the representative of a majority of the Company's employees either before or during the strike. In this connection, the record shows only that a bare claim was pressed upon the Company that the UMW represented the majority of its employees, but no supporting evidence thereof was adduced. Indeed, the only evidence there is on the question consists in the voluntary authorization of dues checkoffs in favor of Stone Workers, which supports, rather than rebuts, the presumption that the Stone Workers continued to be the majority representative of the Company's employees at the time of the strike.

"We need not and do not here determine whether there are any circumstances under which a union may lawfully strike for recognition if another union has once been granted a certificate which has not been superseded or revoked. We hold that, under the circumstances of this case, the certification was still outstanding and the strike for recognition was a clear violation of Section 8 (b) (4) (C)."

The Board then found that all respondents (other than Tungsten) were responsible "on and after January 10, for conducting a strike for recognition of UMW, thereby violating Section 8 (b) (4) (C) of the Act," and that they were responsible for coercive acts, thus violating Section 8 (b) (1) (4) of the Act. These respondents were ordered to cease and desist from (106 N.L.R.B. at p. 909):

"(a) Engaging in, or inducing or encouraging the employees of the Tungsten Mining Corporation to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or to perform any services, where an object there-

"Chairman Farmer is of the view that a union which strikes for recognition in the face of an outstanding certification—which is still recognized as valid by the employer and certified union—has no standing to contest the majority status of the certification. He is of the opinion that the statutory prohibition expressed in Section 8 (b) (4) (C) was intended in these circumstances to be absolute."

of is to force or require the Tungsten Mining Corporation to recognize or bargain with District 50, United Mine Workers of America, or with Tungsten Mining Local of United Mine Workers of America, or with United Mine Workers, as the representative of the employees of said Company, so long as United Stone and Allied Products Workers of America, CIO, or any labor organization other than District 50, United Mine Workers of America or Tungsten Mining Local of United Mine Workers of America, has been certified as the representative of such employees under the provisions of Section 9 of the Act."

The Order was enforced by a decree of this court entered without opinion on March 19, 1954.[16] The Order and Decision of the Board of August 26, 1953, and the decree of this court enforcing the Board's order, were not mentioned by the district judge in his opinion. In fact, the court struck from plaintiff's complaint herein all references to the proceedings before the Board on the ground that such allegations[17] were "irrelevant, immaterial and improper, and evidence in support of them would be inadmissible on the trial . . ." That court's own injunction of February 3, 1953, is referred to only as part of the statement of facts.[18]

In the absence of any explanation of record, we are forced to assume that the district judge considered that a

[16] District 50 did not, in the enforcement proceedings before this court, contest the Decision and Order of the Board, but contended that the Board's petition for enforcement should be denied because:

"1. The question is moot, and

"2. There has already been substantial compliance by [District 50] with the Board's order."

[17] These allegations related to the determination by the Board that District 50 had been guilty of an unfair labor practice. No specific reference was made to the certification question, although the complaint alleged that District 50 was "bound by the said decision and all findings and conclusions therein . . ."

[18] "A federal injunction was issued by this court on February 3, 1953, at which time the strike ended and representatives of District 50 sent copies of the injunction to all on strike, posted notices of it, and left the scene for good."

decision by the Board on the question of the status of Store Workers, as a certified union, at and during the strike, was not binding in a subsequent civil action for damages. It may be granted that there was no estoppel, as that term is technically defined,[19] in the Decision of the Board. Nevertheless, the Board was required to, and did, make a specific finding of fact on a matter within its jurisdiction. The Order, based upon such finding, was enforced by this Court.

The point for decision here was not involved in *Longshoremen* v. *Juneau Spruce Corp.* 1952, 342 U.S. 237, 72 S. Ct. 235, 96 L. Ed. 275. In that case the court held that a finding by the Board of an unfair labor practice through illegal picketing under Section 8 (b) (4) (D) was not a condition precedent to an action for damages under Section 303 (a) (4). It was in this connection that the court said (342 U.S. at pp. 243-244): "Sec. 8 (b) (4) (D) and Sec. 303 (a) (4) are substantially identical in the conduct condemned. Section 8 (b) (4) (D) gives rise to an administrative finding; see 303 (a) (4) to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be exclusive of each other. Certainly there is nothing in the language of Sec. 303 (a) (4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true . . ."

[19] But see A.L.I. Restatement, Judgments, sec. 68 (1), comments c, e, o, p; Sec. 69 (1).

But the issuance, and revocation, of certifications is entrusted expressly and solely[20] to the National Labor Relations Board, subject to judicial review in suits to enforce unfair labor practice orders. In this case, the Board determined that at the times in question, Stone Workers' "certification was still outstanding" within the meaning of Section 8 (b) (4) (C).

In *United Brick & Clay Workers* v. *Deena Artware*, 6 Cir. 1952, 198 F. 2d 637, cert den. 1952, 344 U.S. 897, 73 S. Ct. 277, 97 L. Ed. 694; reh. den. 1953, 344 U.S. 919, 73 S. Ct. 346, 97 L. Ed. 708, the court held that in a suit under Section 303 (b) a jury question was presented as to whether picketing by United was against Deena, and the purpose thereof. This "main issue" was "one of the issues involved collaterally" (198 F. 2d at p. 639) in *National Labor Relations Board* v. *Deena Artware*, 6 Cir. 1952, 198 F. 2d 645, in which the court enforced an order of the Board requiring Deena to cease and desist from interference and refusal to bargain. The same alleged secondary boycott; the basis of recovery in 198 F. 2d 637, was urged by Deena as a defense in 198 F. 2d 645. The court disagreed with the "ruling of the Board as a matter of law, and are of the opinion that whether the Union was guilty of a 'secondary boycott' . . . was a factual question . . . The Examiner found for the Union. The finding is supported by substantial evidence on the record considered as a whole, and is accepted on this review . . ." (198 F. 2d at p. 653).

In noting the inconsistency of the findings (after stating that "the issues presented by the two cases are not the

[20] Sunshine Coal Co. v. Adkins, 1940, 310 U.S. 381, 404, 60 S. Ct. 907, 84 L. Ed. 1263:

> "'Furthermore, where . . . Congress has created a special administrative procedure for the determination of the status of persons or companies under a regulatory act and has prescribed a procedure which meets all requirements of due process, that remedy is exclusive. See Anniston Manufacturing Co. v. Davis, 301 U.S. 337.'"

same, 198 F. 2d at p. 639), the court pointed out that the proceedings were heard by different fact finding agencies; the witnesses were not the same; and the cross-examination was by different attorneys.

Apart from the fact that the Board is the only body authorized to certify or decertify, there is an element in this case distinguishing it from any that have been called to our attention or disclosed by our own research. In this case it was stated by District 50's attorneys that in the hearing before the Board at which time the question was whether Stone Workers was a certified union within the meaning of the Act, and when the questions of majority status, and whether Stone Workers was a defunct union were involved, District 50 deliberately refrained from offering the very evidence (alleged requests that Stone Workers "no longer be the certified Bargaining Agent at the Tungsten Mining Corporation"; membership applications and check-off authorizations to District 50; and revocation of "voluntary dues assignment" to Stone Workers) relied upon as a defense to the damage suit.

We hold that under the facts of this particular case the deliberate withholding from the Board,[21] the body to which is entrusted the revocation of certifications, and procedure through which is the "formal mode for selection and rejection of bargaining agents" (*Brooks v. National Labor Relations Board*, 348 U.S. at p. 103; *National Labor Relations Bd. v. Sanson Hosiery Mills*, *supra*, 195 F. 2d at pp. 352-353) of these "facts" relied upon as a defense below, binds District 50, and prevents it from successfully defending this suit on the ground that at the times in question Stone Workers was not the certified bargaining agent of Tungsten's employees within the meaning of Section

[21] And therefore from this court in considering the Board's petition for enforcement of its order, the "transcript of the entire record in the proceedings" before the Board being before this court. 29 U.S.C. Sec. 160 (e).

303 (a) (3). As a consequence, the strike, and District 50's participation therein, were unlawful.

In remanding the case for further proceedings, we of course intimate no opinion on what, if any, damages are recoverable.

Reversed and Remanded

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7293

TUNGSTEN MINING CORPORATION, *Plaintiff-Appellant*,

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee.

PETITION FOR REHEARING BY DEFENDANT-APPELLEE

To the Honorable Chief Judge and Honorable Judges of the United States Court of Appeals for the Fourth Circuit

District 50, United Mine Workers of America, by its counsel does very respectfully petition this court to grant it a rehearing in the above-styled cause and does petition the court upon such rehearing to withdraw the opinion of this court delivered February 12, 1957 and to vacate the order reversing and remanding the case and in lieu thereof to render an opinion sustaining and affirming the decision and judgment of the United States District Court for the Eastern District of North Carolina at Raleigh and to enter an order appropriate to such affirmance.

SUPPORTING ARGUMENT

GROUND NO. 1

The Opinion of the Court Is Based in Part Upon a Statement of Facts Not Supported by the Record

The following language appears on page 21 of the Opinion:

> "Add to this the fact that the authorizations relied upon by District 50[1] had been obtained in association with threats of strike and violence (which materialized), and it cannot be said that Tungsten acted improperly or unlawfully in insisting upon a properly supervised secret ballot to determine the real, uncoerced wishes of its employees."

There is not a word of testimony in either the Appendix of Plaintiff-Appellant or the Appendix of Defendant-Appellee in Case No. 7293 (the instant case) to justify the quoted statement.

The Decision and Order of the National Labor Relations Board in Case No. 11-CC-3 which came before this Court on a petition for enforcement of its order therein and bears the number 6738 in this Court, contains no statement of fact to support the quoted statement.

As a last resort, we read the 292 page transcript in the official report of the proceedings before the National Labor Relations Board. We found no testimony that supports the quoted statement. We did find in Volume 2 of the official report, the testimony of Benjamin Harrison Dalton beginning at page 179 which the petitioner for enforcement did not include in his Appendix. That witness did not connect the defendants with any threats of strike or violence in acquiring signatures to the authorizations.

The testimony of James Willard Pack at page 219 of Volume 2 of the official report of the proceedings does not connect the defendants with threats of force or violence in getting the signature to a single authorization.

If any signature had been obtained in association with threats of strike and violence, surely the man threatened would have been found in the interval between the collapse of the strike on February 3, 1953 and the National Labor Relations Board hearing beginning on March 3, 1953. The Company had had in its hands since January 22, 1953, the names of two hundred sixty-nine (269) of its employees who had signed official notice slips (Appendix of Defendant-Appellee, page 7).

The Intermediate Report of Mr. Wheatley, Trial Examiner in the National Labor Relations Board proceedings, nowhere connects this Petitioner with any threats of strike or violence in obtaining authorizations, although a person reading hurriedly lines 15-27 on page 8 of that report might become confused.

In this case, the chronology is all important. It was on October 16, 1952 at noon that Mr. Fohl informed Mr. Sweet, Vice-President and General Manager of Tungsten Mining Corporation, that a majority of the employees had signed up with District 50. We have been unable to find a scintilla of evidence that dates any threat of strike and violence prior to October 16th. The paragraph following the quotation and predicated upon it is, therefore, without such support.

GROUND NO. 2

The Statement in the Opinion: "We Hold That Under the Facts of This Particular Case the Deliberate Withholding From the Board,[21] the Body to Which Is Entrusted the Revocation of Certifications, and Procedure Through Which is the 'Formal Mode for Selection and Rejection of Bargaining Agents') Brooks v. National Labor Relations Board, 348 U.S. at P. 103; National Labor Relations Bd. v. Sanson Hosiery Mills, Supra, 195 F. 2d at pp. 352-353) of These 'Facts,' Relied Upon as a Defense Below, Binds District 50, and Prevents It From Successfully Defending This Suit on the Ground That at the Times in Question Stone Workers Was Not the Certified Bargaining Agent of Tungsten's Employees Within the Meaning of Section 303 (a)(3). As a Consequence, the Strike, and District 50's Participation Therein, Were Unlawful", Is Ground No. 2

We submit the following considerations in support of our belief that this language entitles Petitioner to a rehearing:

The quoted language does violence to basic and fundamental principles governing res judicata.

(a) In the first place, this Court said in Case No. 7107, *District 50, United Mine Workers of America, Petitioner, v. National Labor Relations Board, Respondent*, and Case No. 7122, *Pittsburgh Valve Company, Sterling Manufacturing Company, and Hardware Brass Manufacturing Company, Petitioners v. National Labor Relations Board, Respondent*, 234 F.(2d) 565:

> "Not only was the dismissal of the prior petition not based on that ground, but also it is well settled that the principle of res judicata has no application to such action of administrative agencies. *N.L.R.B. v. Baltimore Transit Co.*, 4 Cir., 140 F.2d 51, 54-55; *Wallace Corporation v. N.L.R.B.*, 4 Cir., 141 F. 2d 87, 91, aff. 323 U.S. 248, 253. See also *Pacific Greyhound Lines*, 9 N.L.R.B. 537, 573."

If a decision of the National Labor Relations Board is not res judicata as to the Board then a fortiori there is no

res judicata as to a superior authority; namely, a United States District Court. In this connection, see:

Utah Fuel Company v. *Industrial Commission*, 67 Utah 25, 245 P. 381, 45 A.L.R. 882.
30 Am. Jur. 909, 930, 951-953.
42 Am. Jur., p. 519.
Propper v. *John Bene & Sons, Inc., et al.*, 295 Fed. 769.

(b) Expressed otherwise, if the Decision and Order of the Board in the proceedings before it is not res judicata then the manner in which the union charged with an unfair labor practice conducts its defense before the Board should have no binding effect in a United States District Court.

(c) Three elements must combine to constitute res judicata. They are these: (1) The parties must be the same; (2) The subject matter must be the same; (3) The issues must be the same. This is clearly expressed in the North Carolina cases of:

Hardison v. *Everett*, 192 N.C. 371, 135 S.E. 288, and *McInturff* v. *Gahagan*, 193 N.C. 147.
See, also, 50 C.J.S., p. 18.

The introductory paragraph of Chapter 3 of A.L.I. restatement of judgments and the discussion thereafter in Chapter 4 do not eliminate these essential elements.

(d) Let us see, therefore, if there was an identity of parties in the unfair labor practice proceedings before the National Labor Relations Board which became the enforcement case numbered 6738 in this Court. The parties litigant therein are clearly stated in the last paragraph of the Complaint before the National Labor Relations Board (Case No. 11-CC-3) which reads:

"WHEREFORE, the General Counsel of the National Labor Relations Board, on behalf of the Board, on the 10th day of February, 1953, issues this Complaint against District 50, United Mine Workers of America, Tungsten Mining Local of United Mine Workers of

America, Robert R. Fohl, Director, Region 19, District 50, United Mine Workers of America, and William Cordell Holloman, President Tungsten Mining Local, United Mine Workers of America, the Respondents, herein."

(e) The General Counsel, through his representative, was in control of the presentation of the Complainant's case. It is the theory of the law that the Board and the General Counsel were acting in the public interest and not to obtain money judgment or lay the foundation of a money judgment for the Tungsten Mining Corporation. In short, it was not a proceeding in behalf of Tungsten Mining Corporation.

When the enforcement proceedings came before this Court in case numbered 6738, the title of the case shows the Petitioner to be National Labor Relations Board and the Respondents to be District 50, United Mine Workers of America, including Robert R. Fohl and Tungsten Mining Local of United Mine Workers of America, including William Cordell Holloman.

In the instant case, the parties are simply Tungsten Mining Corporation, Plaintiff-Appellant and District 50, United Mine Workers of America, Defendant-Appellee.

(f) The two actions did not seek the same relief. One sought to stop an unfair labor practice, the other sought a money judgment for the individual plaintiff. In this connection, see:

Boeing Airplane Co. v. *Aeronautical Industrial District*, 91 F. Supp. 596, affirmed 188 F. 2d 356, certiorari denied 342 U.S. 821.

(g) Two simple and most apt examples illustrate the point we make as to parties and res judicata. They are:

(1) An automobile collision takes place between A's car and B's car. B is convicted in Recorder's Court of reckless driving. A thereafter sues B for damages

on account of wanton conduct. Innumerable times, courts have had to refuse to let A show B's conviction as any evidence whatsoever in the case.

(2) B assaults A and is convicted in the County Court of Misdemeanors for criminal assault. In A's suit against B for damages for assault and battery, innumerable times, courts have had to refuse to let A show B's conviction as any evidence whatsoever in the case.

REASONS FOR AN APPENDIX HERETO

The language of the Court set up as Ground No. 2 was due to statements made in response to questions from the members of the Court during the argument of this case. The paragraph of the Opinion preceding the language of Ground No. 2, does not purport to give the exact language of the statement of counsel for Petitioner. As an aid to this Court, we have set out in the Appendix the language used by counsel as accurately as it is possible for us to reproduce it.

(h) The chronology of the litigation will, we believe, help this Court to arrive at a just and correct decision. We, therefore, recapitulate:

January 9, 1953—Strike began.

January 14, 1953—Temporary Restraining Order issued by State Court.

January 24, 1953—Petition for Injunction in Aid of Process filed in the District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

February 3, 1953—Temporary Injunction granted by Judge Gilliam in the said United States District Court.

February 3, 1953—Strike ends. Petitioner complies fully with injunction of the said United States District Court.

November 25, 1953—Petition for Enforcement filed in this Court.

December 3, 1953—Damage Suit filed in District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

December 31, 1953—Answer to Petition for Enforcement filed.

The foregoing chronology shows that when the National Labor Relations Board proceedings came on to be heard on March 3, 1953, two injunctions, one state and the other Federal, had been issued and complied with.

This Petitioner had lost its effort to organize Tungsten Mining Corporation. The National Labor Relations Board could command Petitioner to do no more than it had already done. For the reasons stated to the Court on argument as shown by the Appendix, Petitioner did not appear by counsel.

When Petitioner filed its answer in the enforcement proceedings in Case No. 6738, the damage suit was pending. Petitioner summarized its position in the two short sentences cited in Footnote 16 on page 27 of the Opinion. This summary was preceded by nine pages of brief and argument.

(i) The language of the Opinion set up in Ground No. 2 announces in effect a completely new doctrine. It imposes a duty upon a union charged with an unfair labor practice to put on evidence. No such obligation is imposed by the statute. We have not been able to find any precedent placing such an obligation upon a labor union.

In some instances, employers have used the processes of the National Labor Relations Board to conduct a fishing expedition. If the holding in this case is allowed to stand, the union must bring in the fish and spread them out before a prospective claimant for damages.

The quoted language introduces a new theory of estoppel. Ordinarily, a man is estopped because his action or repre-

sentation leads his adversary to take action in reliance thereupon. We have found no evidence to indicate that Tungsten Mining Corporation took any action due to a false or misleading representation.

Where there is no legal duty to speak, silence, we submit, is no basis for an estoppel. If Petitioner had admitted the charges in the Board's proceedings that, of course, could have been introduced in evidence in the damage suit. However, page 11 of the official report of proceedings before the National Labor Relations Board shows an express denial of the paragraphs of the Complaint alleging violations of the Statute. Pages 46 and 48 of the official report show that a written denial was filed by this Petitioner. However, counsel for the Board in its Petition for Enforcement did not set that up as an exhibit.

(j) Evidently, the controlling testimony which had not been discovered at the time Case No. 6738 was heard in this Court, was the testimony on the trial of the damage suit of J. B. Foreman, the former Administrator for the Stone Cutters' Union.

Page 104 of the Appendix to Plaintiff-Appellant's brief shows Mr. Foreman was contacted on the Saturday before the Monday on which the trial of the damage suit began. The significant evidence he gave shows that he found a bad situation in that it appeared that a majority of the members of the Stone Cutters' Union had signed with District 50. (Defendant-Appellee's Appendix, p. 102) There was no question in his mind that a majority had signed up with District 50 and he believed he talked to Mr. Sweet and Mr. Long several times about the membership of the employees. He informed them relative to the membership and he did not feel there was any question in anybody's mind that the membership had signed with District 50 (Defendant-Appellee's Appendix, p. 103) and he thought the Stone Cutters had very few members, maybe five per cent (5%). (Defendant-Appellee's Appendix, p. 105).

At page 113 of the Plaintiff-Appellant's Appendix, Mr. Long contradicts Mr. Foreman. District Judge Gilliam saw both these witnesses and heard them testify. He could decide better than anybody else which man was telling the truth.

The proceedings before the National Labor Relations Board were not decertification proceedings. Formal certification and decertification is the prerogative of the National Labor Relations Board. Decertification is not the only way in which a certification can cease to be operative and effective. See, to this effect:

Public Service Electric & Gas Co., 59 N.L.R.B. 325.
WTOP, Inc., 114 N.L.R.B. No. 194.
National Gas Co., 106 N.L.R.B. 819.

The question, therefore, of whether the certification of the Stone Cutters was a live and functioning certification was one to be decided by Judge Gilliam in the damage suit.

GROUND NO. 3

The Opinion of the Court Deprives This Petitioner of Due Process of Law Guaranteed It by the Fifth Amendment to the Constitution of the United States

This Ground depends upon the soundness and validity of our previous argument. If the Court has placed upon this Petitioner a duty not required by law and denied it a defense because it did not perform that non-legal duty and if the Opinion deprives it of a trial according to accepted principles of res judicata, then Petitioner has been denied due process.

CONCLUSION

In conclusion, we respectfully submit that the Opinion departs from fundamental principles of law and confuses and joins together two separate proceedings which the Congress was very careful to keep apart. It reduces the dig-

nity of a United States District Court and makes it little more than a mere accountant for the National Labor Relations Board. The Act provides that the injured person may sue in any court of the United States. A suit implies that the claims of the plaintiff and the defenses of the defendant will be decided by the trial court in accordance with accepted principles of law. Under such principles, neither res judicata nor estoppel are applicable to the determination of this case.

For the foregoing reasons, Petitioner respectfully submits that a rehearing should be granted and the judgment of the lower court affirmed.

Respectfully submitted,

E. Crampton Harris
1018-19 First National Building
Birmingham, Alabama

Charles P. Green
824-827 Insurance Building
Raleigh, North Carolina

Banks Arendell
824-827 Insurance Building
Raleigh, North Carolina

Armistead J. Maupin
930 Insurance Building
Raleigh, North Carolina

Yelverton Cowherd
900 Fifteenth Street, N. W.
Washington 5, D. C.

Alfred D. Treherne
900 Fifteenth Street, N. W.
Washington 5, D. C.

Counsel for District 50,
United Mine Workers of America

APPENDIX TO PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7293

TUNGSTEN MINING CORPORATION, *Appellant*,

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Appellee*.

Appendix to Petition for Rehearing

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss

Before me the undersigned authority in and for the District of Columbia personally appeared Mr. Yelverton Cowherd known to me, who being by me first duly sworn deposes and says:

During the course of the argument in the City of Baltimore before the United States Court of Appeals for the Fourth Circuit, Chief Judge Parker asked several questions concerning reasons why District 50 did not make a fuller participation in the National Labor Relations Board case.

Our attorneys from North Carolina having had no occasion to discuss such points, and those decisions having been administrative determinations wholly within our legal department in District 50, I felt it incumbent upon me, and did rise and ask the Court to hear me. This was rather unusual but I obtained the permission of the Court by stating that the Court had brought on a situation which

was my responsibility and could only be answered by me and which was my decision.

Chief Judge Parker was obviously deeply interested and I told the Court that, as is always the case, when an injunction is filed against a union in its organizational stages the union is destroyed, and when a National Labor Relations Board order comes out against a union in such cases there is no punishment but simply a cease and desist, which for all practical purposes was in effect at the time.

I explained that there had been an "aid to process" injunction issued out of the Federal District Court in North Carolina at the request of the National Labor Relations Board which had completely stopped all union development at Tungsten, and we were, therefore, concerned only with the potential annoyance and costs that could arise against us out of litigation which had already been threatened openly by the management with claims of large damages; that because of this potential threatened law suit on our hands, I considered it advisable not to present a single witness who might be available or could be found for our side to be subjected to cross-examination from any source until the trial of that case. Accordingly, I advised our Field Staff that inasmuch as the "aid to process" injunction was outstanding and that the terms of that injunction were as full and complete as is ever required by a cease and desist order from the National Labor Relations Board in such cases and that that injunction had destroyed the Local Union, there could be no good accomplished by presenting any testimony before the Board; that it would be unwise in the face of the impending damage suit to offer any evidence in the hearing before the Board.

By the time the enforcement order came on for hearing before the United States Court of Appeals for the Fourth Circuit the damage suit was pending; we were already engaged in preparation of argument and motions and we

had no real reason to offer any objection, procedurally or factually at that time. Further, the controlling testimony that was ultimately introduced by us at the trial was not known to us at that time and was not heard about and discovered until a very short time prior to the trial itself, and was developed by our very latest associated attorney in North Carolina.

In response to questioning by Chief Judge Parker as to our reasons for not showing our authorization and check-off cards, I explained that the protection of the individual was of paramount interest to avoid discharges or other discriminations against persons who signed with our union, and explained that we always do, and did in this case, offer our authorization cards for examination or inspection by disinterested persons, principally ministers of the Gospel, and had done so with this company but this company would not even discuss the point.

Then Chief Judge Parker said, "Well, you did offer to exhibit the cards through those channels?" and I said, "Yes, sir. We certainly did."

YELVERTON COWHERD
Yelverton Cowherd

(SEAL)

Subscribed and sworn to before me
by the said Yelverton Cowherd this
8th day of March, 1957

MAGDELEN WESLEY
Notary Public

My Commission Expires April 14, 1960.

City of Washington
District of Columbia } ss

Before me the undersigned authority in and for the District of Columbia personally appeared Mr. Alfred D. Treherne known to me, who being by me first duly sworn deposes and says:

I am of counsel in the case above referred to by Mr. Cowherd and was in the court room during the presentation and argument therein referred to. I heard all of the queries of the Court and the answers made. I have read Mr. Cowherd's affidavit in full and state that it is accurate.

Alfred D. Treherne
Alfred D. Treherne

(Seal).

Subscribed and sworn to before me
by the said Alfred D. Treherne this
11th day of March, 1957

Eliza Crump
Notary Public

My Commission Expires June 15, 1958.

Before me the undersigned authority in and for the County of Wake, State of North Carolina personally appeared Mr. Charles Green known to me, who being by me first duly sworn deposes and says:

I am of counsel in the case above referred to by Mr. Cowherd and was in the court room during the presentation and argument therein referred to. I heard all of the queries of the Court and the answers made. I have

read Mr. Cowherd's affidavit in full and state that it is accurate.

CHARLES P. GREEN
Charles P. Green

(SEAL).

Subscribed and sworn to before me by the said Charles Green this 12th day of March, 1957

MAXINE M. MORSE
Notary Public

My Commission expires March 1, 1959.

Before me the undersigned authority in and for the County of Wake, State of North Carolina personally appeared Mr. Armistead J. Maupin known to me, who being by me first duly sworn deposes and says:

I am of counsel in the case above referred to by Mr. Cowherd and was in the court room during the presentation and argument therein referred to. I heard all of the queries of the Court and the answers made. I have read Mr. Cowherd's affidavit in full and state that it is accurate.

ARMISTEAD J. MAUPIN
Armistead J. Maupin

(SEAL)

Subscribed and sworn to before me by the said Armistead J. Maupin this 12th day of March, 1957

MAXINE M. MORSE
Notary Public

My commission expires March 1, 1959.

Before me the undersigned authority in and for the County of Wake, State of North Carolina personally appeared Mr. Banks Arendell known to me, who being by me first duly sworn deposes and says:

I am of counsel in the case above referred to by Mr. Cowherd and was in the court room during the presentation and argument therein referred to. I heard all of the queries of the Court and the answers made. I have read Mr. Cowherd's affidavit in full and state that it is accurate.

BANKS ARENDELL
Banks Arendell

(SEAL)

Subscribed and sworn to before me
by the said Banks Arendell this
12th day of March, 1957

MAXINE M. MORSE
Notary Public

My commission expires March 1, 1959.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7293

TUNGSTEN MINING CORPORATION, *Plaintiff-Appellant,*

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee.

Petition for Rehearing by Defendant-Appellee.
Certificate of Counsel

We, E. Crampton Harris, first appearing as counsel for District 50, United Mine Workers of America, on the foregoing Petition for Rehearing and Charles P. Green appearing as counsel for District 50, United Mine Workers of America both on the foregoing Petition for Rehearing and on the original submission and argument of the cause in the United States Court of Appeals for the Fourth Circuit do, pursuant to Rule 19 of this Court and in support of the foregoing Petition for Rehearing, each hereby certify that we are of counsel as above stated and do further certify that the foregoing Petition for Rehearing is filed in good faith and not for delay.

E. CRAMPTON HARRIS
E. Crampton Harris

CHARLES P. GREEN
Charles P. Green

Counsel for District 50, United Mine Workers of America, Petitioner and Defendant-Appellee

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7293

TUNGSTEN MINING CORPORATION, *Plaintiff-Appellant,*

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA,
Defendant-Appellee.

Certificate of Service

I hereby certify that I have deposited in the United States Post Office with sufficient air mail postage thereon to insure delivery a copy of the Petition for Rehearing in the above styled case, with the Appendix thereto and a copy of the supporting certificate of counsel that it is filed in good faith and not for delay properly addressed to counsel for Plaintiff-Appellant as follows:

F. L. Fuller, Jr., Esq.
Durham, North Carolina

A. W. Gholson, Jr., Esq.
Henderson, North Carolina

Whiteford S. Blakeney, Esq.
Charlotte, North Carolina

Done this _____ day of March, 1957.

.....
Counsel for District 50,
United Mine Workers
of America

Filed March 26, 1957

UNITED STATES COURT OF APPEALS,
FOR THE FOURTH CIRCUIT

No. 7293

TUNGSTEN MINING CORPORATION, *Appellant*,

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.

This Court having rendered its decision reversing the decision of the United States District Court for the Eastern District of North Carolina, and the appellee having on March 13, 1957, filed with the Court a petition for a rehearing of said cause, and same having been fully considered:

It is now here ordered that the rehearing asked for be and same is hereby denied.

JOHN J. PARKER
Chief Judge, Fourth Circuit.

SIMON E. SOBELOFF
United States Circuit Judge.

R. DORSEY WATKINS
United States District Judge.

A true copy,

Teste:

RICHARD M. F. WILLIAMS, JR., *Clerk,*
U. S. Court of Appeals for the Fourth Circuit.

Opinion and Judgment of District Court

I heard the evidence in this civil action without a jury. The plaintiff's prayer for judgment grew out of a strike of the employees of the plaintiff at its tungsten mine and processing mill located in Vance County, North Carolina. What follows is a chronological summary of the pertinent events, as I find them from the evidence.

Tungsten Mining Corporation, referred to as "Tungsten"; and United Stone & Allied Products Workers of America, C.I.O., referred to as "Stone Workers", after an election, entered into a collective bargaining agreement on April 3, 1946. Stone Workers was certified by the National Labor Relations Board as the Collective Bargaining Representative of the employees of Tungsten. Contracts between Tungsten and Stone Workers were always in force from May 15, 1946, until January 15, 1953. Tungsten and Stone Workers changed the anniversary date to January during the interim to have it approximately coincide with the calendar year for their mutual convenience.

William Holleman and many of his fellow workers had become dissatisfied with the representation afforded them by Stone Workers. In October, 1952, Holleman contacted Frank Lumpkin, a relative, of Hopewell, Virginia, employed at the Hercules Powder Company; and the two discussed the process of changing unions. The union at Hercules Powder Company was District 50, United Mine Workers of America, the defendant before me, referred to as "District 50". Shortly after Holleman made this inquiry, W. A.

Shuey, an officer of the Hercules Local, visited Tungsten, talked with Holleman, and supplied application cards for membership in District 50.

An organizing campaign launched by Holleman proved to be a success. In short order, 286 of Tungsten's approximately 400 employees signed up with District 50. Of these 286, 269 who had been members of Stone Workers also signed forms to sever relations with that union and cancel their dues checkoff authorization held by the Company.

About the middle of October, 1952, Robert Fohl, Regional Director for the United Mine Workers; Lucian Wood, Field Representative for District 50; and Shuey came to Tungsten and conferred with James R. Sweet, Vice President and General Manager of Tungsten. The District 50 representatives informed Sweet of their union's majority status at Tungsten. They explained to him that union's avoidance of the National Labor Relations Board's facilities and offered to have District 50's status verified through the medium of some other disinterested third party. Local ministers and the North Carolina Department of Labor were suggested. There was, of course, no offer or request for the membership lists to be handed over directly to Tungsten.

A few days later, J. B. Foreman, a national representative of Stone Workers, arrived on the scene. He came in the capacity of Administrator of the Tungsten Local, having been appointed by Sam Scott, President of Stone Workers International, under a clause in the Stone Workers' constitution that provides for such an appointment in the event that a crisis is found to exist in a local. Foreman quickly lost any doubts he may have held as to the existence of a crisis. At a meeting of the majority of Tungsten's employees he was shouted down without a chance to make himself heard. Inquiry among the workers convinced him that virtually all had joined District 50, and he so informed the Company.

On November 13, 1952, George Pendley, Secretary of Stone Workers Local, sent to Tungsten a letter advising that the contract with Stone Workers, due to expire January 15, 1953, should not be renewed. Copies were sent to Stone Workers and the National Labor Relations Board.

W. L. Long, Vice President and General Counsel of Tungsten, and Sweet were uncertain what course Tungsten should follow in the situation that confronted them. In particular, they were puzzled by Foreman's claimed power to act for the Stone Workers. Long and Sweet attended a company meeting in New York in December. It was arranged for them to confer while there with an attorney for the Stone Workers from Boston. Foreman and Scott were also present at this conference.

Long and Sweet were readily convinced of Foreman's capacity to act for the Stone Workers Local in negotiating with Tungsten. Whether or not substantial agreement was reached there about a new contract is not at all clear from the evidence. Each of those present who testified before me had his own version of what was said and done in that New York hotel room more than three years before the trial. Regardless of where the negotiations were had, Tungsten and Stone Workers did enter into a new contract a few days later.

Through December and the early days of January, 1953, District 50 meetings and organization continued. Tungsten made no effort whatsoever to accurately evaluate the obvious situation of which it had full and ample notice. Before and during the strike Tungsten steadfastly refused to even consider that the Stone Workers Local was a defunct organization. Instead, by the testimony of its officers, Tungsten placed its reliance on three principal factors: (1) Advice from the N.L.R.B., which was completely out of touch with the situation; (2) Between 250 and 270 dues checkoff authorizations that it still held; (3) Stone Workers' N.L.R.B. Certification, which was more than six and one-half

years old. Long, as General Counsel of Tungsten, was (and still is) of the opinion that Tungsten should refuse to bargain with any union not certified by the N.L.R.B.

On January 9, 1953, the storm broke. Holleman, who was then President of the unrecognized District 50 Local, was working in the mine with James Knight, Secretary of the new organization. The two were doing carpentry work in an overhand stope. About 11:30 A.M., it became necessary for them to descend to the tunnel beneath to cut a piece of lumber for their work in the stope. This done, they proceeded to eat their lunch before the regulation noon lunch hour. The assistant mine foreman and the shaft boss arrived. Holleman and Knight were fired on the spot.

They left the premises and began to meet employees on the next shift, and word of their discharge spread. By early evening a fullfledged strike was in progress. The days that followed were characterized by large scale confusion about the gates to the mine and the surrounding countryside. The confusion was attended by violence and rowdyism. On January 14, an order from the North Carolina Superior Court limited the number of pickets about the gate to six and forbade others from approaching within a hundred feet. A defendant named in that court order was District 50.

Fohl and Wood were about the scene of the strike frequently before the restaining order was issued which named their organization as a defendant. When these District 50 representatives learned that Holleman and Knight had been fired, they advised the two to present their grievance to Tungsten under the Stone Workers' contractual procedure. Holleman and Knight declined to do so, insisting that such a move would be futile. Wood was present on the night of the fourteenth when the restraining order was served. He assisted a Highway Patrolman in stepping off the one hundred feet specified in the order.

On January 15, 1953, Tungsten's old contract with Stone Workers expired and District 50 formally adopted the six day old strike for the purpose of getting recognition. Strike headquarters was established at a rented building some distance from the mine. The union furnished picket signs demanding recognition. At all times, before and after the fifteenth, District 50 representatives cautioned strikers against violence. A federal injunction was issued by this Court on February 3, 1953, at which time the strike ended and representatives of District 50 sent copies of the injunction to all on strike, posted notices of it, and left the scene for good.

Tungsten's action against District 50 is founded on Title 29, U.S.C.A. Sec. 187. The pertinent sections of that statute read as follows: "(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service, where an object thereof is—(3) *forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title;* (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of Section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

The language above is found also in Section 158(b)(4)(C). In this section the action defined in the repeated lan-

guage is proscribed as an unfair labor practice for which an injunction is the appropriate remedy. Interpretations of this key language in the context of Section 158 are persuasive for determining the meaning in the context of Section 187. Such an interpretation was recently made in *Ralph E. Kennedy, Regional Director of the Fourteenth Region of the National Labor Relations Board* v. *Warehouse & Distribution Workers Union, Local 688*, 29 C.C.H. Labor Cases 69736 (D.C. Mo., 1956). The facts of this case are readily seen to present a striking parallel to those of the case at bar.

Following an election by secret ballot, Coca-Cola Bottling Company Salesmen Association (herein called Association) was duly certified as the exclusive bargaining representative of the employees of Coca-Cola Bottling Company of St. Louis, Missouri, (herein called Coca-Cola). A collective bargaining agreement was entered into between Association and Coca-Cola on July 17, 1953, providing for its expiration on November 1, 19[illegible]. Negotiations for a new contract were commenced in June, 1953, but none was agreed upon.

On September 2, 1955, respondent Warehouse & Distribution Workers Union, Local 688 (A.F.L.), (herein called Local 688), filed with National Labor Relations Board a petition for election of collective bargaining representative of the employees of Cola-Cola. Hearings on the petition were held. This procedure for recognition was closed to the defendant before me, District 50, because of its well known refusal to bare its affairs to public scrutiny. However, in *United Mine Workers of America* v. *Arkansas Oak Flooring Company*, decided April 23, 1956, 351 U.S. 62, the United States Supreme Court made it clear that the National Labor-Management Relations Act "does not make it a condition that the representative . . . shall be certified by the Board, or even be eligible for such certification." District 50 U.M.W.A. v. N.L.R.B., 4th Circuit, decided June 5, 1956.

About October 25, 1955, while a decision on the petition was pending, Local 688 made demands on Coca-Cola for immediate recognition as the collective bargaining representative of the employees in the certified unit (Association) and that Coca-Cola negotiate a new agreement with Local 688, the latter union threatening to strike and picket Coca-Cola's premises to enforce its demands. Coca-Cola rejected such demands. All this occurred in the face of the certification of Association and before decertification.

Local 688 called the threatened strike on November 9, 1953, and the strike and picketing continued thereafter.

Association continued to function after October 24, 1955; Coca-Cola continued to deduct Association's membership dues from employees' wages and Association continued to accept the payments of such dues checked off; and Coca-Cola was at all times in possession of authorizations for check off of Association dues which had not been formally revoked in writing from about 173 of Coca-Cola's approximately 196 employees.

Judge Moore found two other important facts as follows:

"(a) Whatever may have been the membership of the employees, by October 24, 1955, the Association had clearly lost the support of a majority of the employees in the unit, and a majority had voluntarily designated Respondent as the agent, they desired to be their collective bargaining representative. Respondent retained the voluntary allegiance of a majority of the employees in the unit until the trial in this case.

"(b) Before the time of the strike the Company, while it may not have been convinced that Respondent represented a majority of employees in the unit, had good cause to doubt, and did doubt, that the Association retained the support of a majority."

Upon the foregoing facts Judge Moore rendered his decision, based on these conclusions among others:

"Since the relief sought by petitioner is being denied on other grounds, it is not necessary to consider whether the Association's status, or its representation of the employees in the unit, had deteriorated to such an extent that the Association's certification should for this reason be regarded as totally ineffective.

"Because the Association had, by November 9, 1955, when the Association's certification was more than one year old, lost the support of a majority of the employees in the bargaining unit, and the Company had at least a bona fide doubt that the Association retained the support of a majority, the Company was then no longer required by law to bargain collectively with the Association, but was free to "'refuse to bargain further with it.'" *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 104 — — —. An object of Respondent's conduct, therefore, was to require the Company to violate its duty of neutrality between the Association and Respondent — — — — not to require the Company to violate its duty to bargain with the certified union.

"Section 8(b)(4)(C) of the act proscribes strikes "having as their purpose forcing any employer to disregard his obligation to recognize and bargain with a certified union and in lieu thereof to bargain with or recognize another union". — — — — That section does not, as the Board contends, proscribe strikes directed toward compelling the employer to violate his duty of neutrality between two competing unions, nor does it proscribe strikes to gain an object (recognition) which could alternatively be gained, eventually, by means of the peaceful processes of the Board's election procedures, for it is not written in those terms, and there is no rational relation between these circumstances and the criterion established by the Act: whether 'another labor organization has been certified as the representative of (the) employees under the provisions of Section 9.' A strike is not rendered unlawful by the presence of such circumstances. — — — — Accordingly

Section 8(b)(4)(C) does not proscribe the conduct of Respondent in this case.

"The petition for an injunction should therefore be denied."

To my mind Judge Moore's opinion from which I have quoted at length is sound and, if followed, completely determinative of the case now before me.

The cases hold that while two unions are vying for recognition the employer is obligated by law to remain neutral; but, as pointed out in *District 50 U.M.W.A.* v. *N.L.R.B.* above cited, this does not "require that the employer refuse to recognize a bargaining agent chosen by a majority of his employees if such majority is so clearly established that there can be no true question with regard thereto." And also under the cases this right of the employer exists as a general rule where there has been a certification by the Board following an election, provided that one year has elapsed since the certification. Here, about six years had passed since the certification and I am of the opinion that Tungsten was at liberty to recognize District 50 upon clear proof that a majority of the employees was in January, 1953, committed to that union and had repudiated Stone Workers. This unquestionably was the situation and Tungsten was on notice. Tungsten really makes no attack on the large "sign up" which had been obtained by District 50 and there is no vestige of proof or even a suggestion that the signatures on the cards were not authentic. The record indicates that Tungsten had no hand in switching employees from Stone Workers to District 50. So that, it is my view that Tungsten was free to recognize District 50 in spite of the Board's certification of Stone Workers, but Tungsten preferred a contrary course, taking the position that it would recognize only a union certified by the N.L.R.B. Such position was without justification in law, as above pointed out.

Fairly considered, it seems to me, the action of defendant in adopting the strike, after the termination of the contract between Tungsten and Stone Workers, when in fact Stone Workers was no longer the choice of the employees as bargaining agent, should not be held to be in violation of the statute. No other avenue of relief was open to the defendant and the majority of the employees which it represented. Recourse to the Board was not available, but, as held in *U.M.W.A.* v. *Arkansas Oak Flooring Co.*, above, and other cases, defendant was not precluded from representing employees as bargaining representative. It should not be held on the facts here that defendant's object was to force Tungsten to disregard its obligation to Stone Workers. The object was rather to lead Tungsten away from the generally prevailing obligation of neutrality where a real contest between two unions is on, to cause it to act in the light of realities, to get Tungsten to realize and accept the fact that it was at that time under no obligation to Stone Workers, which was no longer the bargaining agent "designated or selected for the purpose of collective bargaining by the majority of the employees."

I am adjudging that District 50 is not liable to Tungsten because Stone Workers, despite its certification, was no longer a going concern, nor did it represent the overwhelming majority of Tungsten's employees—a situation of which Tungsten had every reason to be well aware. In view of this holding, it is unnecessary to discuss or decide the question of agency under Title 29, U.S.C.A., Section 185, or the question of liability for wildcat strikes that are adopted by a defendant union.

In accord with the foregoing opinion, it is hereby ordered, adjudged, and decreed that the plaintiff Tungsten Mining Corporation recover nothing of the defendant District 50, United Mine Workers of America by this action. It is further ordered that the defendant recover of the

plaintiff the defendant's costs incurred in the defense of this action.

s/ Don Gilliam
United States District Judge

EXHIBIT D-10

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

Civil No. 670

Reed Johnston, Regional Director of the Eleventh Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,
Petitioner

vs.

Tungsten Local Union, United Mine Workers of America, a recently organized labor organization consisting of Cordell Holloman and others, Cordell Holloman, its agent, District 50, United Mine Workers of America, and Robert R. Foil, its agent,
Respondents

Decree

This cause came on to be heard upon the verified petition of Reed Johnston, Regional Director of the Eleventh Region of the National Labor Relations Board, on behalf of said Board, pursuant to Section 10 (l) of the National Labor Relations Act as amended, for an injunction pending final adjudication of the Board of the matters involved, and upon an order to show cause why injunctive relief as prayed should not be granted. The Court, upon consideration of the petition, respondents' oral answer thereto in open court, testimony, exhibits, evidence, oral arguments and briefs, duly made and entered its findings of fact and conclusions of law. It appearing to the satisfaction of the Court that there is reasonable cause to believe that respondents have

engaged in and are engaging in conduct in violation of Section 8 (b), sub-section (4) (C) of the said Act, and that such acts and conduct affect commerce within the meaning of Section 2, sub-sections (6) and (7) of the Act, Now Therefore,

It Is Ordered, Adjudged and Decreed as follows:

1. That respondents Tungsten Local Union, United Mine Workers of America, a recently organized labor organization consisting of Cordell Holloman and others, Cordell Holloman, its agent, District 50, United Mine Workers of America, and Robert R. Fohl, its agent, and each of them, and their officers, representatives, agents, servants, employees, attorneys, members and all persons in active concert or participation with them, be and they hereby are restrained and enjoined, pending the final adjudication of this matter by the National Labor Relations Board, from:

Engaging in, or by picketing, order, instructions, directions, appeals, threats, intimidation, coercion or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, inducing or encouraging the employees of the Tungsten Mining Corporation, or of any other employer, to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is to force or require the said Tungsten Mining Corporation to recognize or bargain with respondent Tungsten Local Union, United Mine Workers of America, and/or respondent District 50, United Mine Workers of America, as the collective bargaining representative of any of the employees of said corporation in the unit for which the United Stone and Allied Products Workers of America, C.I.O. has been duly certified by the Regional Director of the National Labor Relations Board as the ex-

clusive bargaining representative under the provisions of Section 9 of the National Labor Relations Act.

2. Respondents shall forthwith notify all members of respondent Tungsten Local Union, United Mine Workers of America by mailing letters to their respective last known places of residence and by posting notices for thirty days at all places where said respondent Tungsten Local Union conducts its business or where notices to its members are customarily posted, of the terms and provisions of this decree and directing that its members shall cease their strike and picketing at the mine and plant of the Tungsten Mining Corporation for the prescribed object above described, and that pending final adjudication of this matter by the Board, all orders, instructions, directions, rules or regulations contrary to the terms of this decree are revoked, rescinded and withdrawn.

3. Respondents shall forthwith prepare a written press release stating that respondents have rescinded and withdrawn their demand that the Tungsten Mining Corporation shall recognize or bargain with respondents or any of them, and stating respondents' intention to comply with this decree and that respondents have directed their members to cease their strike and picketing at the mine and plant of the Tungsten Mining Corporation for the prescribed object above described. Respondents shall deliver signed copies of such press release for publication to the newspapers, radio stations and other media of news communication through which the respondents caused publication of their demands upon said corporation for recognition and bargaining and of the purposes and objects of the strike at the said corporation about January 12, 1953.

4. Respondents, and each of them, shall file with this Court, within thirty days after service of a copy of this decree upon them, a sworn statement showing in detail the steps taken by them to comply with this decree.

5. Jurisdiction of this cause is retained for the purpose of giving full effect to this decree, and for the purpose of making such further and other orders and decrees as may be necessary herein.

Done at Raleigh, North Carolina, this 3 day of February, 1953.

/s/ Don Gilliam, *Judge*
United States District Judge.

A true Copy, Teste:

A. Hand James, *Clerk*

By /s/ Keen Jones
Deputy Clerk.

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106 NLRB No. 153 D-7625
Vance County, N. C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 11-CC-3

In the Matter of

District 50, United Mine Workers of America: Tungsten Mining Local of the United Mine Workers of America: Robert R. Fohl, Director, Region 19, District 50, United Mine Workers of America: William Cordell Holloman, President Tungsten Mining Local, United Mine Workers of America

and

Tungsten Mining Corporation

Decision and Order

On May 13, 1953, Trial Examiner Albert P. Wheatley issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices, and recom-

mending that they cease and desist therefrom and take certain affirmative action as set forth in the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief; the General Counsel filed a brief in support of the Intermediate Report, and an exception to the posting provisions of the Trial Examiner's recommended order; and Tungsten Mining Corporation filed a statement in support of the Intermediate Report.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs and statement, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following addition and modifications:

I

As set forth in the Intermediate Report, in April, 1946, the Board conducted an election among the Company's employees, and issued a certification in favor of Stone Workers. Thereafter, commencing in May of that year, the Company and Stone Workers executed an uninterrupted succession of collective bargaining agreements, the fourth of which, by an amendment executed late in 1950, was made effective until January 15, 1953, and from year to year thereafter unless modified or terminated by 60-days' notice.

In the fall of 1952, Respondent Holloman, with the help of District 50, organized the Tungsten Mining Local of UMW at the Company's plant. Holloman was elected president of the Local.

While Tungsten Mining Local was being organized, and thereafter, meetings were held with the Company's employees. At these meetings, representatives of District 50 made a series of speeches in which they pointed out that

UMW did not use the facilities of the Board to settle representation questions, and said that they would probably call a strike if UMW could not get recognition in any other way.

On October 3, Respondent Fohl, Regional Director of District 50, and other representatives of District 50 asserted to the Company that UMW represented a majority of the Respondent's employees, and requested that the Company recognize UMW as bargaining representative. The claim was coupled with a threat to strike if UMW was not recognized. Having ascertained that a majority of its employees had authorized dues check-offs in favor of Stone Workers, the Company advised Fohl that Stone Workers was the certified representative of its employees and that the Company would continue to recognize it as such until another bargaining agent was certified by the Board.

Thereafter, on October 22, 1952, Fohl advised the Company that UMW's purpose would be achieved by "economic action, if necessary," asserting that UMW was determined to "kick out an unwanted union by our own strength." On October 30, 1952, Fohl sent the Board a letter to advise it of the "situation," warning that UMW intended to protect the interests of the Company's workers "by every moral and legal means at our disposal, including that of strike action, if necessary."

In mid-November, 1952, Stone Workers notified the Company that it wished to end the existing contract and proposed that a new contract be negotiated. On December 18, 1952, the Company and Stone Workers executed a new contract to become effective on January 15, 1953, the terminal date of the existing contract.

On January 9, 1953, the Company discharged two employees, including Holloman, who thereupon spoke with other members of the Local. They agreed to strike in protest against the discharges. The strike began at 6:00 p.m.

At 7:00 p.m. representatives of District arrived at the Company's plant.

On January 10, 1953, Holloman and Fohl prepared a press release announcing that "recognition of the UMW would be an additional purpose of the strike." The strike continued for sometime thereafter and continued to have as one of its avowed purposes the recognition of UMW or District 50 by the Company as the bargaining representative of its employees.

On January 9, 11, 12, 13 and 20, a series of coercive acts, by strikers, described in detail in the Intermediate Report, occurred at or in the vicinity of the picketing. These acts consisted of threats, express or implied, directed against nonstrikers; the blocking of a road to the plant, and an assault upon a nonstriker in the presence of other nonstrikers.

On January 12, 13, 16, and 19, other coercive acts, also described in detail in the Intermediate Report, occurred away from the picket lines. These acts consisted in trailing, threatening, and assaulting nonstrikers and firing shots into the house of a nonstriker. One threat directed against a non-striker was made by Respondent Holloman himself.

On January 14, 1953, a State Court enjoined various "unlawful acts" by strikers. The Injunction was read to the pickets by a representative of District 50, who admonished the pickets to comply therewith.

During the strike, representatives of District 50 were present at the picket lines; gave Holloman "instructions" and "suggestions" in running the strike; distributed signs and buttons among the pickets bearing the name of District 50; paid the rent for premises which were used as strike headquarters; and, with District 50 funds, posted bond for strikers accused by State authorities of criminal acts. One of the acts for which bond was posted was, as the Trial Examiner found, a coercive act directed against a non-

striker. On January 14, during the course of the strike, a representative of District 50 announced that it was taking over the conduct of the strike.

In addition to his other activities described above, Respondent Fohl was present at the picket lines near the Company's plant and gave advice to Holloman concerning the management of the strike.

As already indicated, Respondent Holloman conferred with, and urged, the employees to begin the strike, and himself threatened a nonstriker with reprisals. He also assisted in "running" the strike; kept records pertaining to picketing; and was himself present at the picket lines.

II

We agree with the Trial Examiner's conclusion that the age of Stone Workers' certification does not preclude a finding that the strike for recognition of UMW violated Section 8 (b) (4) (C) of the Act.

Section 8 (b) (4) (C) provides in pertinent part that:

> It shall be an unfair labor practice for a labor organization or its agents . . . to engage in . . . a strike . . . where an object thereof is . . . forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9.

As stated above, Stone Workers was certified by the Board as the bargaining representative of the Company's employees in May 1946, and the strike for the recognition of the UMW occurred in January 1953. At issue before the Board, therefore, is whether Stone Workers was, at the time of the strike, still a "certified" labor organization within the meaning of the quoted language of Section 8 (b) (4) (C).

That language places no time limitation on the duration of a certification otherwise entitled to the protection of that section. Nor does the legislative history of the Act reveal that the Congress intended, or even considered, such a limitation.[1]

The Respondents, however, contend in effect that the language of the statute should not be applied in this case. They argue that Stone Workers' certification was not valid in 1953 because "the strike and majority participation [in the UMW] rebut any presumption of such continued existing certification." This contention is apparently founded upon the Board's doctrine with respect to an employer's obligation to bargain under Section 8 (a) (5) of the Act. In that context, the Board has held that the majority status of a certified union, absent unusual circumstances, is conclusively presumed to continue for one year after certification; thereafter, the presumption is rebuttable and the employer may in good faith question the union's majority status.[2]

We need not, however, here decide whether or not this doctrine is applicable to Section 8 (b) (4) (C) of the Act. For even were we to concede that point, the Respondents' contention still would have no merit. There is no evidence in the record to show, as the Respondents assert, that a majority of the Company's employees participated in the recognition strike. The evidence shows only that there was a strike, that the Company continued to operate its mine, and that a number of employees did not participate in the strike. There is nothing else to show that UMW was the representative of a majority of the Company's employees

[1] The history of the provision indicates only that Section 8 (b) (4) (C) was intended to proscribe conduct, such as a strike, which bypasses the Board's machinery for the peaceful settlement of disputed representation questions. See *H. R. Rep. No. 245*, 80th Cong., 1st Sess. pp. 6, 44 (1947).

[2] See, e.g., *Celanese Corporation of America*, 95 NLRB 664.

either before or during the strike. In this connection, the record shows only that a bare claim was pressed upon the Company that the UMW represented the majority of its employees, but no supporting evidence thereof was adduced. Indeed, the only evidence there is on the question consists in the voluntary authorization of dues check-offs in favor of Stone Workers, which supports, rather than rebuts, the presumption that the Stone Workers continued to be the majority representative of the Company's employees at the time of the strike.

We need not and do not here determine whether there are any circumstances under which a union may lawfully strike for recognition if another union has once been granted a certificate which has not been superseded or revoked. We hold that, under the circumstances of this case, the certification was still outstanding and the strike for recognition was a clear violation of Section 8 (b) (4) (C).[3]

III

We agree with the Trial Examiner that all 4 respondents were responsible for the strike and thereby violated Section 8 (b) (4) (C) of the Act. Respondents Fohl and Holloman, either themselves or through persons acting under their direction and control, induced or encouraged employees of the Company to engage in the strike which had as an object forcing the Company to recognize UMW as representative of its employees. As stated above, and set forth in more detail in the Intermediate Report, Holloman instigated the strike of January 9, Holloman and Fohl jointly decided on January 10 to adopt as one of the objects of the strike recognition of UMW Holloman, with Fohl's

[3] Chairman Farmer is of the view that a union which strikes for recognition in the face of an outstanding certification—which is still recognized as valid by the employer and certified union—has no standing to contest the majority status of the certification. He is of the opinion that the statutory prohibition expressed in Section 8 (b) (4) (C) was intended in these circumstances to be absolute.

advice, managed the strike and attendant picketing, and Holloman himself on January 12 orally solicited a non-striker to join the strike.

We find also that, in engaging in the foregoing conduct, both Holloman and Fohl acted within the scope of their authority as agents of the Local and District 50, respectively. Holloman was the president of the Local, which had been organized under the auspices of UMW for the purpose of representing the employees. In view of his position in the Local, it is proper to infer that he had authority to call and conduct the strike in the instant case with its avowed purpose of obtaining recognition for UMW. There is nothing in the record to rebut this inference. On the contrary, the record shows that the strike was called only after Holloman had consulted with, and obtained the approval of, other members of the Local, and Holloman's press release of January 10 announcing that recognition of UMW was a purpose of the strike was not repudiated by the Local.

Fohl was Regional Director of District 50 UMW, and his letters to the Company and the Board threatening strike action unless the Company recognized UMW were written on stationery bearing a District 50 letterhead. Funds of District 50 were used to supply bail for arrested strikers. Representatives of District 50 other than Fohl gave financial support to the strike, supplied the pickets with signs demanding recognition and bearing the name of District 50, and on January 14 these representatives publicly announced that District 50 was taking over the conduct of the strike. No evidence was offered to rebut the inference arising from these facts that Fohl was empowered by District 50 to seek recognition for it or its affiliated locals from employers within his jurisdiction, that to achieve such recognition, Fohl and the other representatives of District 50 were authorized to call or, as in the instant case, conduct and support a strike, and that in any event the action of Fohl and

the other District 50 representatives in the instant case was ratified by District 50.

We find therefore that all 4 Respondents were responsible on and after January 10 for conducting a strike for recognition of UMW, thereby violating Section 8 (b) (4) (C) of the Act.

IV

We agree with the Trial Examiner that all four Respondents were responsible for the conduct by strikers and pickets both at and away from the picket line, found by the Trial Examiner to be coercive, and that all Respondents therefore violated Section 8 (b) (1) (A) of the Act.

However, in imputing responsibility for such conduct to the Respondents we do not adopt the Trial Examiner's reasoning insofar as it predicates such responsibility on the fact that the Respondents engaged the services of the pickets. We do not consider it necessary to decide whether by the mere fact of "engaging" pickets or establishing picket lines a union or union official incurs responsibility for all conduct by the pickets in furtherance of the purpose of the picketing. The record shows other grounds for holding the Respondents liable for the misconduct of the pickets and strikers, on which we rely.

Respondent Holloman, as we have found above, had general authority, as president of the Local, to call and conduct the strike. We find, therefore, that the Local was responsible for his conduct in threatening Self, a non-striker, at his home with reprisals unless he joined the strike,[4] and that by this threat alone, Holloman and the Local violated Section 8 (b) (1) (A) of the Act.

In addition, in making the foregoing threat, Holloman indicated that he was aware of the generally coercive nature

[4] See *Sunset Line and Twine Co.*, 79 NLRB 1487, 1510.

of the picketing; for he warned Self that if he reported for work during the strike he would run the risk of reprisals by "the boys."

While there is no evidence that Holloman actually witnessed the acts of violence and intimidation found by the Trial Examiner to be coercive, they occurred under such circumstances that they could not have failed to come to his attention. Some of these incidents involved from 50 to 100 pickets. They were committed for the most part in public places, in the presence of onlookers, and in at least one instance in the presence of UMW representatives. The incidents continued over a period of 11 days. Under these circumstances, we find that Holloman was aware of many, if not all, the instances of coercion described by the Trial Examiner, and that it became his duty as the one who, by his own admission, "ran" the strike to repudiate such misconduct and take disciplinary action against the persons responsible therefor.[5] Instead, he himself engaged in similar misconduct of the same general character.

We find, under these circumstances, that Holloman, acting within the scope of his authority, as president of the Local, acquiesced in and condoned the misconduct of the other pickets and strikers, and that both Holloman and the Local thereby violated Section 8 (b) (1) (A) of the Act.

For similar reasons, we find that Respondent Fohl, who, as Regional Director of District 50, participated in the conduct of the strike, and, like Holloman, took no effective

[5] The Trial Examiner found that Holloman was one of those who on January 9 admonished the other pickets to keep order on the picket line. However, Holloman, although in charge of the strike, took no action against those responsible for the extensive and flagrant acts of violence. The fact that union officials may have forbidden coercive conduct does not relieve them of responsibility therefor, particularly when they themselves, as in the case of Holloman, have participated therein. *Cory Corporation*, 89 NLRB 572, 978.

action to prevent the extensive and numerous acts of coercion by pickets and strikers which could not have escaped his notice, was responsible for such acts. We find, therefore that Fohl and District 50 thereby violated Section 8 (b) (1) (A) of the Act.

Additional reason for holding District 50 responsible for such coercive acts consists in the fact that District 50 and the Local, as co-sponsors of the strike and picketing, were engaged in a joint venture, thereby rendering District 50 responsible for all the acts which we have attributed to the Local and Holloman.[6]

V

Unlike the Trial Examiner, we find that the Respondents did not violate Section 8 (b) (1) (A) of the Act solely by reason of the calling of the strike for recognition in violation of Section 8 (b) (4) (C). A violation of Section 8 (b) (4) (C) of the Act is not *per se* a violation of Section 8 (b) (1) (A).[7]

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the

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[6] See *Smith Cabinet Manufacturing Co., Inc.*, 81 NLRB 886, 889; *Sunset Line & Twine Co.*, 79 NLRB 1487; *Irwin-Lyons Lumber Co.*, 87 NLRB 54, 78. Except for the acts committed by Holloman, *Member Houston* would not hold any of the Respondents responsible for the coercive acts committed by strikers. He believes that the Board's finding in this respect is necessarily predicated upon an assumption that the strikers and pickets who committed the coercive acts were the "agents" of the unions—an assumption which the Board has heretofore not made. *Cory Corporation*, 84 NLRB 972, 978; *Smith Cabinet Mfg. Co., Inc.*, 81 NLRB 886, 891.

[7] See *Perry Norvell Co.*, 80 NLRB 225; *Watson's Specialty Store*, 80 NLRB 533, 539; *National Maritime Union of America*, 78 NLRB 971.

Respondent District 50, United Mine Workers of America, its officers, representatives and agents, including the Respondent Robert R. Fohl, and the Respondent Tungsten Mining Local of United Mine Workers of America, its officers, representatives and agents, including the Respondent William Cordell Holloman, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging the employees of the Tungsten Mining Corporation to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or to perform any services, where an object thereof is to force or require the Tungsten Mining Corporation to recognize or bargain with District 50, United Mine Workers of America, or with Tungsten Mining Local of United Mine Workers of America, or with United Mine Workers, as the representative of the employees of said Company, so long as United Stone and Allied Products Workers of America, CIO, or any labor organization other than District 50, United Mine Workers of America or Tungsten Mining Local of United Mine Workers of America, has been certified as the representative of such employees under the provisions of Section 9 of the Act.

(b) Assaulting and threatening to assault or otherwise to restrain or coerce employees of the Tungsten Mining Corporation.

(c) Trailing employees of Tungsten Mining Corporation and physically preventing them from working.

(d) In any other manner restraining or coercing employees of the Tungsten Mining Corporation in the exercise of the rights guaranteed in Section 7 of the Act, including the right to refrain from any or all concerted activities, as guaranteed by said section.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post in conspicuous places at their business office and meeting places in the vicinity of Tungsten Mining Corporation, Vance County, North Carolina, including all places where notices to members are customarily posted, copies of the notice attached hereto as an Appendix.* Copies of such notice to be furnished by the Regional Director for the Eleventh Region, shall, after being duly signed by representatives of the Respondent Unions and individually by Respondents Fohl and Holloman, be posted by these Respondents immediately upon receipt thereof and maintained for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(b) Mail to the Regional Director for the Eleventh Region copies of the notice attached hereto as an Appendix, for posting, the Company consenting on the bulletin boards of Tungsten Mining Corporation, Vance County, North Carolina, where notices to employees are customarily posted. The notices shall be maintained on the Company's bulletin boards for a period of sixty (60) consecutive days thereafter. Copies of said notice, to be furnished by the Regional Director for Eleventh Region, shall, after being signed as provided in paragraph 2(a) of this Order, be forthwith returned to the Regional Director for such posting;

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* In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

(c) Notify the Regional Director for the Eleventh Region in writing, within ten (10) days from the date of this Order, what steps they have taken to comply herewith.

Signed at Washington, D. C.

GUY FARMER,
Chairman
JOHN M. HOUSTON,
Member
ABE MURDOCK,
Member
IVAR H. PETERSON,
Member
National Labor Relations Board

(SEAL)

United States Constitution, Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

National Labor Relations Act, as amended, Section 1, Last Paragraph:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred

by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 61 Stat. 136; 29 U.S.C. 151.

Section 2(1)—Definitions:

"When used in this subchapter—

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." 61 Stat. 137; 29 U.S.C. 152(1).

Section 7:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)." 61 Stat. 140; 29 U.S.C. 157.

Section 8 (a)(5):

"(a) It shall be an unfair labor practice for an employer—

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 61 Stat. 140; 65 Stat. 601; 29 U.S.C. 158.

Section 8 (b)(4)(C):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

"(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;" 61 Stat. 140; 65 Stat. 601; 29 U.S.C. 158.

Section 9 (a):

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment." 61 Stat. 143; 65 Stat. 601; 29 U.S.C. 159.

Section 9 (B)(3):

"(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election." 61 Stat. 143; 65 Stat. 601; 29 U.S.C. 159.

Section 13:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 61 Stat. 151; 29 U.S.C. 163.

Section 303 (a)(3) and (b):

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." 61 Stat. 158; 29 U.S.C. 187.

Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A.

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948.

Conclusion of Brief of District 50 on Petition for Enforcement of an Order of the National Labor Relations Board:

"It is, therefore, respectfully submitted that the Court should deny the petition of the National Labor Relations Board for the reasons that:

1. The question is moot, and

2. There has already been substantial compliance by respondents with the Board's order.

It is earnestly contended that nothing good or equitable could come from the enforcement of such an order. The Local Union is non-existent, the alleged unfair labor practices ceased long before the Board hearings, and the issues are dead and almost forgotten. Probing old wounds will do nothing to improve labor relations, and respondents sincerely believe that neither the company, the workers, nor the public would be well served by the enforcement of a vain and futile order."